



Billing Code: 4410-13

DEPARTMENT OF JUSTICE

28 CFR Part 36

CRT Docket No. 126; AG Order No. 3449-2014

RIN 1190-AA63

Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters;

Movie Captioning and Audio Description

AGENCY: Department of Justice, Civil Rights Division.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice (Department) is issuing this notice of proposed rulemaking (NPRM) in order to propose amendments to its regulation for title III of the Americans with Disabilities Act (ADA), which covers public accommodations and commercial facilities, including movie theaters. The Department is proposing to explicitly require movie theaters to exhibit movies with closed captioning and audio description at all times and for all showings whenever movies are produced, distributed, or otherwise made available with captioning and audio description unless to do so would result in an undue burden or fundamental alteration. The Department is also proposing to require movie theaters to have a certain number of individual closed captioning and audio description devices unless to do so would result in an undue burden or fundamental alteration. The Department is proposing a six-month compliance date for movie theaters' digital movie screens and is seeking public comment on whether it should adopt a four-year compliance date for movie theaters' analog movie screens or should defer rulemaking on analog screens until a later date.

DATES: The Department invites written comments from members of the public. Written comments must be postmarked and electronic comments must be submitted on or before [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until midnight Eastern Time at the end of that day.

ADDRESSES: You may submit comments, identified by RIN 1190-AA63, by any one of the following methods:

- Federal eRulemaking website: *<http://www.regulations.gov>*. Follow the Web site's instructions for submitting comments. The Regulations.gov Docket ID is DOJ-CRT-126.
- Regular U.S. mail: Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 2885, Fairfax, VA 22031-0885.
- Overnight, courier, or hand delivery: Disability Rights Section, Civil Rights Division, U.S. Department of Justice, 1425 New York Avenue, N.W., Suite 4039, Washington, D.C. 20005.

FOR FURTHER INFORMATION CONTACT: Zita Johnson-Betts, Deputy Section Chief, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307-0663 (voice or TTY). This is not a toll-free number. Information may also be obtained from the Department's toll-free ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY).

You may obtain copies of this NPRM in alternative formats by calling the ADA Information Line at (800) 514-0301 (voice) and (800) 514-0383 (TTY). This NPRM is also available on the Department's Web site at *<http://www.ada.gov>*.

SUPPLEMENTARY INFORMATION:

Electronic Submission of Comments and Posting of Public Comments

You may submit electronic comments to <http://www.regulations.gov>. When submitting comments electronically, you must include DOJ-CRT-126 in the search field, and you must include your full name and address. Electronic files should avoid the use of special characters or any form of encryption and should be free of any defects or viruses.

Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. Submission postings will include any personal identifying information (such as your name and address) included in the text of your comment. If you include personal identifying information (such as your name and address), in the text of your comment but do not want it to be posted online, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your comment. You must also identify all the personal identifying information you want redacted. Similarly, if you submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Relationship to Other Laws

The Department of Justice regulation implementing title III, 28 CFR 36.103, provides that except as otherwise provided in part 36, that part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the

regulations issued by Federal agencies pursuant to that title. *See* § 36.103(a). In addition, the title III regulation provides that part 36 does not affect the obligations of a recipient of Federal financial assistance to comply with the requirements of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and any implementing regulations issued by Federal agencies. *See* § 36.103(b). Finally, part 36 does not invalidate or limit the remedies, rights, and procedures of any other Federal, State, or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them. *See* § 36.103(c).

These provisions remain unchanged. Compliance with the Department’s title II and title III regulations does not ensure compliance with other Federal statutes.

I. EXECUTIVE SUMMARY:

Purpose of Proposed Rule

The Department of Justice (Department) is issuing this notice of proposed rulemaking (NPRM) in order to propose amendments to its regulation implementing title III of the Americans with Disabilities Act of 1990 (ADA), which covers public accommodations and commercial facilities—including movie theaters—to explicitly require movie theaters to exhibit movies with closed captioning and audio description, as well as to provide individual captioning and audio-description devices for patrons who are deaf or hard of hearing or blind or have low vision. In the movie theater context, “closed captioning” refers to captions that only the patron requesting the closed captions can see because the captions are delivered to the patron at or near the patron’s seat. Audio description is a technology that enables individuals who are blind or have low vision to enjoy movies by providing a spoken narration of key visual elements of a visually delivered medium, such as actions, settings, facial expressions, costumes, and scene

changes. Audio description can be transmitted to a user's wireless headset through infra-red or FM transmission.

Title III of the ADA contains broad language prohibiting public accommodations from discriminating against individuals with disabilities, 42 U.S.C. 12182(a), as well as more specific statutory provisions intended to counter particular forms of disability-based discrimination by owners, operators, or lessees of public accommodations. Of particular relevance to this rulemaking, covered entities must take "such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently * * * because of the absence of auxiliary aids and services" unless they can show that doing so would result in a fundamental alteration or undue burden. 42 U.S.C. 12182(b)(2)(A)(iii). The Department's regulation implementing title III's auxiliary aid provision reiterates the obligation of covered entities to ensure effective communication with individuals with disabilities and identifies, among other things, open captioning, closed captioning, and audio recordings, as examples of auxiliary aids and services. 28 CFR 36.303(a)-(c).

Despite movie theaters' title III obligation to provide effective communication to patrons who are deaf or hard of hearing or blind or have low vision, these individuals are often shut out from the movie-going experience; this exclusion occurs even though the vast majority of motion pictures released by the major domestic movie studios include closed captioning and to a lesser extent, audio description. While there has been an increase in the number of movie theaters exhibiting movies with closed captions and to a much lesser extent, audio description, due in large part to successful disability rights litigation brought by private plaintiffs during the past few years, the availability of movies exhibited with closed captions and audio description varies significantly across the United States depending upon locality and movie theater ownership. As

a result, persons who are deaf or hard of hearing or blind or have low vision, who represent an ever-increasing proportion of the population, still cannot fully take part in movie-going outings with family or friends, join in social conversations about recent movie releases, or otherwise participate in a meaningful way in this important aspect of American culture.

The ADA requirements for effective communication apply to all public accommodations (including movie theaters) in every jurisdiction in the United States and should be consistently applied. The ADA protects the rights of persons with disabilities throughout the United States; the right to access movies exhibited with closed captioning and audio description should not depend on whether the person who is deaf or hard of hearing or is blind or has low vision resides in a jurisdiction where movie theaters, subject to a consent decree or settlement, exhibit movies with closed captioning or audio description. And, even in jurisdictions where theaters exhibit movies with captioning and audio description, many do not make captioning and audio description available at all movie showings. Moreover, recent technological changes in the movie theater industry—including wide-spread conversion from analog (film) projection to digital cinema systems—make exhibition of captioned and audio-described movies easier and less costly. The Department is thus convinced that regulation is warranted at this time in order to achieve the goals and promise of the ADA.

Major Provisions

The major provisions of the proposed rule can be summarized as follows.

First, as of the rule's effective date, which the Department is proposing to be 6 months after the publication of a final rule in the **Federal Register**, the NPRM proposes to require movie theaters with digital screens (generally, those exhibiting movies captured on data files stored in a hard drive or flash drive) to exhibit movies with closed captions (although theaters may, at their

own discretion, exhibit movies with open captions instead) and audio description, for all screenings when such movies are produced and distributed with these features unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, *i.e.*, significant difficulty or expense. Such an across-the-board requirement fulfills the effective communication objective by permitting individuals who are deaf or hard of hearing or blind or have low vision to fully and equally participate in one of the most quintessential forms of American entertainment—going out to the movies along with the rest of the movie-going public.

In no case would movie theaters be required to create their own captioning or audio descriptions for movies. Rather, whenever the movies that theaters choose to screen are produced and distributed with these accessibility features, movie theaters would be required to ensure that they obtain and then screen those versions. This rule would not prohibit movie theaters from screening movies that are not produced with captions or audio description.

Second, the NPRM does not propose a specific compliance date for analog screens (generally, those exhibiting movies in the traditional form of 35 mm film) in movie theaters. Instead, the Department seeks public comment on two options. Option 1: whether the rule should adopt a delayed compliance date for analog screens four years from the publication of a final rule in the **Federal Register**. The Department believes that a delayed compliance date would allow any small theaters that remain analog to obtain the necessary resources to purchase the equipment to provide closed captioning and audio description. Option 2: because the state of analog movies is in such flux, whether the Department should defer rulemaking with respect to analog movie screens until a later date.

Third, the NPRM proposes to require movie theaters to have a certain number of individual captioning devices capable of delivering the captions at the seat of the individual and to provide them to patrons upon request. The proposed numbers are based upon the number of seats in the movie theater itself and can be shared among the screens in the theater. Individual captioning devices are a necessary part of the process of delivering closed captions, and this requirement is designed to ensure that there will be sufficient numbers of devices available for use when individuals who are deaf or hard of hearing attend the movies.

Fourth, the NPRM proposes to require movie theaters to have a certain number of devices capable of delivering audio description and to provide them to patrons upon request. The NPRM recognizes that the devices currently required by the ADA for assistive listening often contain an extra channel and therefore can also be used to deliver audio description. The NPRM proposes minimal scoping for audio description listening devices and also permits movie theaters that have two-channel devices for assistive listening to use those devices for audio description in lieu of purchasing additional devices.

Fifth, the NPRM proposes to require that movie theaters ensure that their staff has the capability to operate the equipment to show captions and audio description and to show patrons how to use individual devices.

Finally, the NPRM proposes that movie theaters provide the public with notice about the availability of captions and audio description. This provision is necessary because currently not all movies are produced with captions and audio description, and moviegoers who are deaf or hard of hearing or blind or have low vision, should have the ability to find out which movies are accessible to them.

As with other effective communication obligations under the ADA, covered entities do not have to comply with these requirements to the extent that they constitute an undue burden or fundamental alteration.

Costs and Benefits

With respect to the costs and benefits of this rule, the Department has prepared an Initial Regulatory Assessment (Initial RA). The Initial RA assesses the likely costs and benefits of the proposed rule. Expected benefits are discussed and likely costs are estimated for all theaters over the projected life of the rule (15 years), as well as for “small businesses” in the movie exhibition industry as part of an Initial Regulatory Flexibility Analysis (IRFA), included therein.

The Initial RA provides estimates of the total costs for two options. Option 1 assumes a compliance date for digital theaters of six months from the publication of the final rule and a compliance date for analog theaters of four years from the publication date of the final rule. Option 2 assumes that the rule will only apply to digital theaters and that application of the rule’s requirements to analog theaters will be deferred. For Option 1, the total cost for all theaters over the 15-year period following publication of this rule in final form will likely range from \$177.8 million to \$225.9 million when using a 7 percent discount rate, and from \$219.0 million to \$275.7 million when using a 3 percent discount rate, depending on which baseline is used regarding the extent to which theaters are or will soon be providing movie captioning and audio description as proposed in this rule, but independently of this rulemaking.¹ Under Option 1, the annualized costs range from \$19.5 million to \$24.8 million when using a 7 percent discount rate,

¹ Baseline 1 (only one screen per-theater already has the necessary equipment); Baseline 2 (all theaters of those companies affected by recent litigation/settlement agreements already have the necessary equipment); Baseline 3 (all digital theaters estimated by the National Association of Theater Owners (NATO) in 2013 as having captioning capabilities (53 percent) have done so independently of the proposed rule’s requirements). See Initial RA for further details on Baseline estimations.

and from \$18.3 million to \$23.1 million when using a 3 percent discount rate. For Option 2, total costs for all theaters with digital screens over the 15-year period following publication of this rule in final form will likely range from \$138.1 million to \$186.2 million when using a 7 percent discount rate, and from \$169.3 million to \$226.0 million when using a 3 percent discount rate, depending on which baseline is used regarding the extent to which theaters are or will soon be providing movie captioning and audio description as proposed in this rule, but independently of this rulemaking.² When annualized, these costs range from \$15.2 million to \$20.4 million when using a 7 percent discount rate, and from \$14.2 million to 18.9 million when using a 3 percent discount rate. In either case, the Initial RA shows that estimated annual costs for this proposed rule would not exceed \$100 million in any year (under any of the three baseline scenarios).

² Baseline 1 (only one screen per-theater already has the necessary equipment); Baseline 2 (all theaters of those companies affected by recent litigation/settlement agreements already have the necessary equipment); Baseline 3 (all digital theaters estimated by NATO in 2013 as having captioning capabilities (53 percent) have done so independently of the proposed rule's requirements). *See* Initial RA for further details on Baseline estimations.

Table ES- 1: Annualized Costs and Benefits of Proposed Rule (2015 Dollars, 15-year Time Horizon)

	7% Discount Rate			3% Discount Rate		
	Baseline 1 Assumptions (One Screen Per-Theater)	Baseline 2 Assumptions (Litigation-Based)	Baseline 3 Assumptions (NATO Survey Based)	Baseline 1 Assumptions (One Screen Per-Theater)	Baseline 2 Assumptions (Litigation-Based)	Baseline 3 Assumptions (NATO Survey Based)
Costs (million \$)	Option 1 – Four Year Compliance for Analog Screens					
	\$24.8	\$21.1	\$19.5	\$23.1	\$19.7	\$18.3
	Option 2 – Deferred Rulemaking for Analog Screens					
	\$20.4	\$16.7	\$15.2	\$18.9	\$15.6	\$14.2
Benefits	<p>The proposed rule would address the discriminatory effects of communication barriers at movie theaters encountered by individuals who are deaf or hard of hearing or are blind or have low vision. By ensuring that movie theaters screen those movies that are produced and distributed with the necessary auxiliary aids and services—captioning and audio description—and that theaters provide the individual devices needed to deliver these services to patrons with these particular disabilities, this rule would afford such individuals an equal opportunity to attend movies and follow both the audio and visual aspects of movies exhibited at movie theaters. Although the Department is unable to monetize or quantify the benefits of this proposed rule, it would have important benefits. For example, it would provide people with hearing and vision disabilities better access to the movie viewing experience enjoyed by others; it would allow such persons to attend and enjoy movies with their family members and acquaintances; it would allow people with hearing or vision disabilities to participate in conversations about movies with family members and acquaintances; and it would promote other hard-to-quantify benefits recognized in Executive Order 13563 such as equity, human dignity, and fairness.</p>					

Because movie theater complexes vary greatly by number of screens, which significantly impacts overall costs per facility, the Initial RA breaks the movie exhibition industry into four theater types based on size—Megaplexes (16 or more screens), Multiplexes (8-15 screens), Miniplexes (2-7 screens), and Single Screen Theaters—and for Option 1, by digital or analog system. The average capital cost for digital Megaplex theaters in the first year is estimated to total \$38,547, while the average capital cost for digital single screen theaters in the first year is

estimated to total \$3,198. Should the Department proceed under Option 1 and cover analog screens in the final rule, though with a four-year delayed compliance date, per theater costs for analog theaters would be higher than those for digital theaters for each type or size. The first year per-theater capital cost for analog single screen theaters is estimated to total \$8,172. The first year per-theater capital costs for digital single screen theaters would average \$3,198.

The individuals who will directly benefit from this rule are those persons with hearing or vision disabilities who, as a result of this rule, would be able for the first time to attend movies with closed captioning or audio description in theaters across the country on a consistent basis. Individuals who will indirectly benefit from this rule are the family and friends of persons with hearing and vision disabilities who would be able to share the movie-going experience more fully with their friends or loved ones with hearing and vision disabilities.

The benefits of this rule are difficult to quantify for multiple reasons. The Department has not been able to locate robust data on the rate at which persons with disabilities currently go to movies shown in movie theaters. In addition, as a result of this rule, the following number of persons will change by an unknown amount: (1) the number of persons with disabilities who will newly go to movies, (2) the number of persons with disabilities who will go to movies more often, (3) the number of persons who will go to the movies as part of a larger group that includes a person with a disability, and (4) the number of persons with disabilities who would have gone to the movies anyway but under the rule will have a fuller and more pleasant experience. In addition, the Department does not know precisely how many movie screens currently screen movies with closed captioning and audio description, or how many people with hearing or vision disabilities currently have consistent access to movie theaters that provide closed captioning and audio description. Finally, the Department is not aware of any peer-reviewed academic or

professional studies that monetize or quantify the societal benefit of providing closed captioning and audio description at movie theaters.

Data on movie-going patterns of persons who are deaf or hard of hearing or are blind or have low vision is very limited, making estimations of demand very difficult. However, numerous public comments suggest that many persons who are deaf or hard of hearing or are blind or have low vision do not go to the movies at all or attend movies well below the national average of 4.1 annual admissions per person because of the lack of auxiliary aids and services that would allow them to understand and enjoy the movie.

Though we cannot confidently estimate the likely number of people who would directly benefit from this proposed rule, we have reviewed data on the number of people with hearing or vision disabilities in the United States. The Census Bureau estimates that 3.3 percent of the U.S. population has difficulty seeing, which translates into a little more than eight million individuals in 2010, and a little more than two million of those had “severe” difficulty seeing.³ At the same time, the Census Bureau estimates that 3.1 percent of people had difficulty hearing, which was a little more than 7.5 million individuals in 2010, and approximately one million of them having “severe” difficulty hearing. Not all of these people would benefit from this proposed rule. For example, some people’s hearing or vision disability may not be such that they would need closed captioning or audio description. Some people with hearing or vision disabilities may not want to use the equipment for a variety of reasons. Others would not attend public screenings of movies

³ The Census defines difficulty seeing as “experiencing blindness or having difficulty seeing words or letters in ordinary newsprint even when normally wearing glasses or contact lenses.” It defines difficulty hearing as “experiencing deafness or having difficulty hearing a normal conversation, even when wearing a hearing aid.” See U.S. Census Bureau, U.S. Department of Commerce, P70-131, *Americans with Disabilities: 2010 Household Economic Studies* at 8 (2012), available at <http://www.census.gov/prod/2012pubs/p70-131.pdf> (last visited July 14, 2014).

even if theaters provided closed captioning and audio description simply because they do not enjoy going out to the movies—just as is the case among persons without disabilities.⁴ Some people with hearing or vision disabilities may already have consistent access to theaters that screen movies with closed captioning and audio description. And some theaters may not provide closed captioning and audio description for all their movies because it would be an undue burden under the ADA to do so.

In addition to the direct beneficiaries of the proposed rule discussed above, others may be indirect beneficiaries of this rule. Family and friends of persons with these disabilities who wish to go to the movies as a shared social experience will now have greater opportunities to do so. The Department received numerous comments from individuals who are deaf or hard of hearing or are blind or have low vision in response to its 2010 Advance Notice of Proposed Rulemaking on Movie Captioning and Video Description in Movie Theaters describing how they were unable to take part in the movie-going experience with their friends and family because of the unavailability of captioning or audio description. Many individuals felt that this not only affected their ability to socialize and fully take part in family and social outings, but also deprived them of the opportunity to meaningfully engage in the discourse that often surrounds movie attendance. (See the Initial RA, Section 5 (Benefits) for more details and description of the potential benefits of this proposed rule.) Of perhaps greater significance to the discussion of the benefits of this rule, however, are issues relating to fairness, equity, and equal access, all of which are extremely difficult to monetize, and the Department has not been able to effectively quantify and place a

⁴ In 2012, a little more than two thirds (68 percent) of the U.S. and Canadian population over two years old went to a movie at a movie theater at least once that year. See Motion Picture Association of America, *Theatrical Market Statistics* (2012), available from Motion Picture Association of America, <http://www.mpa.org/wp-content/uploads/2014/03/2012-Theatrical-Market-Statistics-Report.pdf> (last visited July 14, 2014).

dollar value on those benefits. Regardless, the Department believes the non-quantifiable benefits justify the costs of requiring captioning and audio description at movie theaters nationwide.

In keeping with the Regulatory Flexibility Act (RFA), the Initial RA examined the economic impact of the proposed rule on small businesses in the movie exhibition industry. The current size standard for a small movie theater business is \$35.5 million dollars in annual revenue. In 2007, the latest year for which detailed breakouts by industry and annual revenue are available, approximately 98 percent of movie theater firms met the standard for small business, and these firms managed approximately 53 percent of movie theater establishments.⁵ The IRFA estimates the average initial capital costs per-firm for firms that display digital or analog movies under Option 1 and for firms that display digital movies under Option 2. The average costs for small firms (which have a proportionately higher number of Single Screens and Miniplexes) were between approximately 0.7 percent to 2.1 percent of their average annual receipts for firms with digital theaters, and between approximately 2.0 percent to 5.7 percent of average annual receipts for firms with analog theaters. The Department has determined that this proposed rule will have a significant economic impact on a substantial number of small businesses.

The Department has used the IRFA to examine other ways, if possible, to accomplish the Department's goals with fewer burdens on small businesses. Based on its assessment, the Department has decided to seek public comment on two options: one that would adopt a four-year compliance date for theaters' analog screens (Option 1), and the other that would defer application of the rule's requirements to movie theaters' analog screens and consider additional rulemaking at a later date (Option 2).

⁵ The size standard of \$35.5 million can be found in U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*, available at http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf (last visited July 14, 2014).

II. Background

A. Movie Basics, Captioning, and Audio Description Generally

The very first movies were silent films. Talking pictures, or “talkies,” added sound as a separate component in the mid-to-late 1920s. Today, there are two formats for exhibiting movies in theaters: analog movies and digital movies. The term analog movie describes what is generally understood as a movie exhibited in a traditional film form (generally 35 mm film). Currently, while the cinematography portion of analog movies is exhibited in a traditional film format, the sound portion of analog movies is generally provided in a digital format. Five to six reels of film are used for a typical two-hour long analog movie. These reels must be physically delivered to each movie theater exhibiting the movie. Digital sound accompanying analog movies is captured on CD-ROMs or optically or digitally on the film itself. Digital sound is synchronized to the visual images on the screen of the analog movie by a mechanism called a reader head, which reads a time code track printed on the film.

A digital movie (digital cinema), by contrast, captures images, data, and sound on data files as a digital “package” that is stored on a hard drive or a flash drive. Digital movies are physically delivered to movie theaters on high resolution DVDs or removable or external hard drives, or can be transmitted to movie theaters’ servers via Internet, fiber-optic, or satellite networks. Digital production, distribution, and exhibition are seen as having many advantages over analog film, including better and longer lasting image quality, availability of higher resolution images, lower production and distribution costs, ease of distribution, availability of enhanced effects such as 3D, ease of exhibition of live events or performances, and greater flexibility in arranging or increasing show times to accommodate unanticipated audience demand.

The movie picture production industry is in the midst of a large and transformative conversion to digital cinema. This conversion is viewed by the industry as one of the most profound advances in motion picture production and technology of the last 100 years. On May 14, 2013, an industry representative testified before Congress that the industry had nearly completed its transition to digital distribution and projection and that approximately 88 percent of all movie theater screens (nearly 35,000 screens) had already converted to digital. Testimony of John Fithian, President and CEO of the National Association of Theater Owners, Before the U.S. Senate Committee on Health, Education, Labor and Pension (May 14, 2013), available at <http://www.help.senate.gov/imo/media/doc/Fithian.pdf> (last visited July 14, 2014).

Captioning makes movies accessible to individuals who are deaf or hard of hearing and who are unable to benefit from the use of the assistive listening systems required for movie theaters to amplify sound. There are, at present, two types of captions available for movies: open captions and closed captions. The terms “closed captioning” and “open captioning” have had special meaning in the movie theater context and differ from the way the terms are used in other settings (*e.g.*, television). In the movie theater context, the movie industry and the courts have used the term “closed captioning” to mean that when the closed captions are in use, only the patron requesting the closed captions can see the captions because the captions are delivered to the patron at or near the patron’s seat. The term “open captioning” has been used in the movie theater context to refer to the circumstances when the theater exhibits the captions so that all patrons see the captions on or near the screen. By contrast, in the television context, the term “closed captioning” has been used to refer to captions that can be seen on the screen when turned on by the viewer. In order to avoid confusion between the specific requirements in this proposed rule and the ways the terms open and closed captioning have historically been used in other

settings, the Department proposes using the terms “closed movie captioning” and “open movie captioning” in the regulatory text to specifically refer to captions that are provided in movie theaters. However, in the preamble, when discussing the history of captioning, the state of captioning technology, the legislative history of the ADA, and court decisions, the Department will continue to use the terms “closed captioning” and “open captioning” because such terms are used in the definition of auxiliary aids at 28 CFR 36.303(b).

Open movie captions are similar to subtitles in that the text of the dialogue is visible to everyone in the movie theater. Unlike subtitles, open movie captions also describe other sounds and sound making (*e.g.*, sound effects, music, and the character who is speaking) in an on-screen text format. Open captions in movies were sometimes referred to as “burned-in” or “hardcoded” captions because they were burned in or incorporated into the film. However, new open-captioning technology enables studios to superimpose captions without making a burned-in copy or having to deliver a special version of the movie. Currently, some movie theaters exhibit open-captioned films at certain limited showings.

Closed movie captioning, as that term is used in the regulatory text of this NPRM, refers to the display of the written text of the dialogue and other sounds or sound making only to those individuals who request it. When requested, the captions are delivered via individual captioning devices used by patrons at their seats.

Audio description⁶ is a technology that enables individuals who are blind or have low vision to enjoy movies by providing a spoken narration of key visual elements of a visually delivered medium, such as actions, settings, facial expressions, costumes, and scene changes.

⁶ In the Department’s Advance Notice of Proposed Rulemaking on Movie Captioning and Video Description (2010 ANPRM), 75 FR 43467 (July 26, 2010), the Department used the term “video description.” In response to comments received from this ANPRM, the Department now refers to this process as “audio description.”

Audio description fills in information about the visual content of a movie where there are no corresponding audio elements in the film. It requires the creation of a separate script that is written by specially-trained writers and recorded on an audiotape or CD that is synchronized with the film as it is projected. The oral delivery of the script is transmitted to the user through infra-red or FM transmission to wireless headsets.

Movie studios decide which movies to provide with captioning and audio description and then arrange to have the captions and audio description produced. Movie studios include these auxiliary aids in movies before the movies are distributed to movie theaters and do not charge movie theaters for this service. Movie studios are increasing the numbers of movies produced with captioning in large part because in 1997 the Federal Communications Commission published regulations requiring programming (including movies) shown on television to be captioned. *See* 47 CFR part 79.

Movie theaters are defined in the proposed rule to include only facilities used primarily for the purpose of showing movies to the public for a fee. As of the end of 2011 there were nearly 39,000 indoor movie screens in the United States and approximately 600 drive-in movie screens. *See* National Association of Theater Owners, *Number of U.S. Movie Screens*, available at <http://natoonline.org/data/us-movie-screens/> (last visited July 14, 2014). Altogether, the four largest movie theater chains based on screen count—Regal Entertainment Group, AMC Entertainment, Inc., Cinemark USA, Inc., and Carmike Cinemas, Inc.—own or operate approximately 18,000 screens. As of 2010, the top ten domestic movie theater chains had 55 percent of the movie screens in the United States and Canada.⁷ According to comments

⁷ In addition to the four movie theater chains listed above, according to data available from the National Association of Theater Owners, the other six movie theater chains rounding out the domestic top ten as of July 2010,

submitted by the National Association of Theater Owners (NATO) in response to the Department's Advance Notice of Proposed Rulemaking on Movie Captioning and Video Description (2010 ANPRM), 75 FR 43467 (July 26, 2010) (discussed below), as of 2010, there were approximately 83 movie theater companies in the United States that own or operate 50 or more screens and, in the aggregate, these companies operate 30,432 screens in the United States. Of the additional 931 movie theater companies that own or operate fewer than 50 screens, 450 operate four screens or fewer, and 362 owners operate one site with one or two screens.

Moreover, the number of small movie theater facilities continues to decline. Single screen and Miniplex (between two and seven screens) theaters steadily declined from 2007 to 2010, while the number of Multiplex (8-15 screens) and Megaplex (16 or more screens) theaters increased over that same time period. *See* Motion Picture Association of America (MPAA),⁸ *Theatrical Market Statistics* (2011), available at <http://www.bumpercarfilms.com/assets/downloads/movies.pdf> (last visited July 14, 2014). The decline in the number of small independently owned theaters is expected to accelerate as a result of the significant decrease anticipated in the availability of first-run films in analog format, as the majority of these small independently owned theaters are analog theaters. In 2011, the head of the MPAA was reported to have predicted that analog films would disappear in less than three years. *See* Tim O'Reiley, *Theater Official Optimistic Despite Attendance Slump*, Las Vegas Review Journal (March 19, 2011), available at <http://www.reviewjournal.com/business/theater->

were Cineplex, Rave Cinemas, Marcus Theaters, Hollywood Theaters, National Amusements Inc., and Harkins Theaters.

⁸ The Motion Picture Association of America (MPAA) is a trade association representing the six major producers and distributors of theatrical motion pictures, home entertainment, and television programs, including Paramount Pictures Corporation, Sony Pictures Entertainment Inc, Twentieth Century Fox Film Corporation, Universal City Studios LLP, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

official-optimistic-despite-attendance-slump (last visited July 14, 2014). Similarly, at the spring 2013 CinemaCon industry convention, an industry analyst stated that by the end of 2015, analog film will no longer exist in cinemas, and it is likely that production of analog film in the United States will end by the end of 2013. See Lyndsey Hewitt, *Local Theaters Face Tough Times as 35 mm Faces Extinction*, Sun Gazette.com (July 11, 2013), available at <http://www.sungazette.com/page/content.detail/id/594504/Local-Theaters-Face-Tough-Times-as-35-mm-faces-extinction.html?nav=5016> (last visited July 14, 2014). Consequently, some, if not most, small independently owned theaters will likely have to close if they cannot afford to convert their projection systems from analog to digital. See also Colin Covert, *Final reel plays amid digital conversion*, Star Tribune (Aug. 27, 2012), available at <http://www.startribune.com/entertainment/movies/167253335.html?refer=y> (last visited July 14, 2014).

Despite the recent economic downturn, movies continue to be a major source of entertainment in the United States. In 2012, moviegoers in the United States and Canada bought a record \$10.8 billion in movie tickets, with the largest number of tickets (1.36 billion) sold in three years. Motion Picture Association of America, *Theatrical Market Statistics* at 4 (2012), available at <http://www.mpa.org/wp-content/uploads/2014/03/2012-Theatrical-Market-Statistics-Report.pdf> (last visited July 14, 2014). Movie theaters continue to draw more people than all theme parks and major U.S. sporting events combined. *Id.* at 10.

B. Legal Authority to Require Captioning and Audio Description

1. The ADA

On July 26, 1990, President George H.W. Bush signed into law the ADA, a comprehensive civil rights law prohibiting discrimination on the basis of disability. The ADA broadly protects

the rights of individuals with disabilities in employment, access to State and local government services, places of public accommodation, transportation, and other important areas of American life. The ADA also requires, in pertinent part, newly designed and constructed or altered public accommodations and commercial facilities to be readily accessible to and usable by individuals with disabilities. 42 U.S.C. 12101 *et seq.*

Title III of the ADA prohibits discrimination on the basis of disability in the “full and equal enjoyment” of places of public accommodation (privately operated entities whose operations affect commerce and that fall into one of twelve categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreational facilities, and doctors’ offices) and requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities such as factories, warehouses, or office buildings)—to comply with the ADA Standards. 42 U.S.C. 12181-12189. Title III of the ADA includes movie theaters within its definition of places of public accommodation. 42 U.S.C. 12181(7)(C). Movie studios and other entities that produce movies to be shown in theaters are not public accommodations by virtue of the making of movies, and therefore are not covered by title III in their production of movies.

Title III makes it unlawful to discriminate against an individual on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. 42 U.S.C. 12182(a). Moreover, title III prohibits public accommodations such as movie theaters from affording an unequal or lesser service to individuals or classes of individuals with disabilities than is offered to other individuals. 42 U.S.C. 12182(b)(1)(A)(ii). Title III requires public accommodations to take “such steps as may be necessary to ensure that no individual with a disability is excluded, denied

services, segregated or otherwise treated differently * * * because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.”⁹ 42 U.S.C. 12182(b)(2)(A)(iii). The statute defines auxiliary aids and services to include “qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments” and “taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments.” 42 U.S.C. 12103(1)(A)-(B).

2. The ADA Title III Regulation¹⁰

The Department of Justice’s regulation implementing title III of the ADA provides additional examples of auxiliary aids and services that are required by the statute. The regulation lists open and closed captioning and audio recordings and other effective methods of making visually-delivered materials available to individuals with visual impairments as examples of auxiliary aids and services that should be provided by public accommodations. 28 CFR 36.303(b)(1)-(2). This list was revised in 2010 to reflect changes in technology and the auxiliary aids and services commonly used by individuals who are deaf or hard of hearing or blind or have low vision. 75 FR 56236, 56253-56254 (Sept. 15, 2010). The title III regulation reiterates the requirement of the statute, stating that a public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids

⁹ An undue burden is one that results in significant difficulty or expense for the public accommodation. *See* 28 CFR 36.104.

¹⁰ Congress gave the Attorney General the authority and responsibility to issue regulations to carry out the provisions of title III of the ADA. 42 U.S.C. 12186(b).

and services, unless the public accommodation can demonstrate that providing such aids and services would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden. 28 CFR 36.303(a). The title III regulation reflects that the overarching objective and obligation imposed by the auxiliary aids and services requirement is that a public accommodation must furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. 28 CFR 36.303(c)(1). The type of auxiliary aid or service necessary to ensure effective communication varies in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. 28 CFR 36.303(c)(1)(ii). Moreover, in order to be effective, auxiliary aids and services must be provided in accessible formats and in a timely manner. *Id.* For individuals who are deaf or hard of hearing and are prevented from being able to effectively use the assistive listening receivers currently provided in movie theaters to amplify sound, the only auxiliary aids presently available that would effectively communicate the dialogue and sounds in a movie are captioning or sign language interpreting. Likewise, for individuals who are blind or who have very low vision, the only auxiliary aid presently available that would effectively communicate the visual components of a movie is audio description.

As stated above, a public accommodation is relieved of its obligation to provide a particular auxiliary aid (but not all auxiliary aids), if to do so would result in an undue burden or a fundamental alteration. To that end, the Department's title III regulation specifically defines undue burden as "significant difficulty or expense" and, emphasizing the flexible and individualized nature of any such defense, lists five factors that must be considered when

determining whether an action would constitute an undue burden. *See* 28 CFR 36.104. These factors include: (1) the nature and cost of the action; (2) the overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site; (3) the geographic separateness, and the administrative or fiscal relationship of the site or sites in question, to any parent corporation or entity; (4) if applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; and the number, type, and location of its facilities; and (5) if applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity. *Id.*

The undue burden defense entails a fact-specific examination of the cost of a specific action and the specific circumstances of a particular public accommodation. This defense also is designed to ensure that the needs of small businesses, as well as large businesses, are addressed and protected.

The Department defines fundamental alteration as a “modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered.” U.S. Department of Justice, *Americans with Disabilities Act ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities* III-4.3600, available at <http://www.ada.gov/taman3.html> (last visited July 14, 2014).

If a provision of a particular auxiliary aid or service by a public accommodation would result in a fundamental alteration or an undue burden, the public accommodation is not relieved of its obligations to provide auxiliary aids and services. The public accommodation is still

required to provide an alternative auxiliary aid or service, if one exists, that would not result in such an alteration or burden but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the goods and services offered by the public accommodation. 28 CFR 36.303(g). It is the Department's view that it would not be a fundamental alteration of the business of showing movies in theaters to exhibit movies with closed captions and audio descriptions in order to provide effective communication to individuals who are deaf or hard of hearing or blind or have low vision.

3. The Legislative History of the ADA

While the ADA itself contains no explicit language regarding captioning (or audio description) in movie theaters, the legislative history of title III states that “[o]pen captioning * * * of feature films playing in movie theaters, is not required by this legislation. Filmmakers are, however, encouraged to produce and distribute open-captioned versions of films, and theaters are encouraged to have at least some pre-announced screenings of a captioned version of feature films.” H.R. Rep. No. 101-485, pt. 2, at 108 (1990); S. Rep. No. 101-116, at 64 (1989).¹¹ Congress was silent on the question of closed captions in movie theaters, a technology not yet developed for use in movie theaters, but it acknowledged that closed captions might be an effective auxiliary aid and service for making aurally delivered information available to individuals who are deaf or hard of hearing. *See* H.R. Rep. No. 101-485, pt. 2, at 107. Importantly, the House Committee stated that “technological advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with disabilities. Such advances may require public accommodations to provide auxiliary aids and

¹¹ In 1990, the only way to include open-captions in a movie was to create a separate print of the movie and then laser-etch, or “burn,” the captions onto that separate print. Limited copies of the open-captioned print were made and these copies were distributed after the uncaptioned versions to some, but by no means all, movie theaters.

services in the future which today would not be required because they would be held to impose undue burdens on such entities.” *Id.* at 108.¹² Similarly, in 1991, when issuing its original title III regulation, the Department stated in preamble language that “[m]ovie theaters are not required * * * to present open-captioned films,” but the Department was silent as to closed captioning. 56 FR 35544, 35567 (July 26, 1991). The Department also noted, however, that “other public accommodations that impart verbal information through soundtracks on films, video tapes, or slide shows are required to make such information accessible to persons with hearing impairments. Captioning is one means to make the information accessible to individuals with disabilities.” *Id.*

The legislative history of the ADA and the Department’s commentary in the preamble to the 1991 regulation make clear that although Congress was not requiring open captioning of movies in 1990, it was leaving open the door for the Department to require captioning in the future as the technology developed. Congress did not specifically mention audio description in the legislative history; however, audio description clearly falls within the type of auxiliary aid contemplated by the ADA. Moreover, given the present state of technology, the Department believes that mandatory requirements for captioning and audio description in movie theaters fit comfortably within the meaning of the statutory text.

4. Federal Appellate Case Law Addressing Captioning and Audio Description

In April 2010, the first and only Federal appellate court to squarely address the question of whether captioning and audio description are required in movie theaters under the ADA

¹² As the district court noted in *Ball v. AMC Entertainment, Inc.*, 246 F. Supp. 2d 17, 22 (D.D.C. 2003), “Congress explicitly anticipated the situation presented in this case [the development of technology to provide closed captioning of movies]. Therefore, the isolated statement that open captioning of films in movie theaters was not required in 1990 cannot be interpreted to mean that [movie theaters] cannot *now* be expected and required to provide closed captioning of films in their movie theaters.”

determined that the ADA required movie theater owner and operator Harkins Amusement Enterprises, Inc., and its affiliates, to screen movies with closed captioning and descriptive narration (audio description) unless such owners and operators could demonstrate that to do so would amount to a fundamental alteration or undue burden. *Arizona v. Harkins Amusement Enterprises, Inc.*, 603 F.3d 666, 675 (9th Cir. 2010). The Ninth Circuit held that because closed captioning and audio descriptions are correctly classified as “auxiliary aids and services,” a movie theater may be required to provide them under the ADA, and thus, the lower court erred in holding that these services fell outside the scope of the ADA. *Id.* (citing 42 U.S.C. 12182(b)(2)(A); 28 CFR 36.303).¹³

Representatives of the movie industry (movie studios and movie theater owners and operators) who commented on the 2010 ANPRM contended that exhibiting captioning is a fundamental alteration of its services. The Department does not agree with that assertion. As the Department asserted in its *amicus* brief filed in the *Harkins* case, exhibiting movies with captioning and audio description does not fundamentally alter the nature of the service provided by movie theaters. The service movie theaters provide is screening or exhibiting movies. The use of auxiliary aids to make that service available to those who are deaf or hard of hearing or blind or have low vision does not change that service. Rather, the provision of auxiliary aids such as captioning and audio description are the means by which these individuals gain access to the movie theaters’ services and therefore achieve the “full and equal enjoyment,” 42 U.S.C.

¹³ A consent decree was entered into on November 7, 2011, in which Harkins agreed to provide closed captioning and audio description at all 346 screens in its 25 movie theaters by January 15, 2013. *See* Consent Decree in *Arizona v. Harkins Amusement Enterprises, Inc.*, 603 F.3d 666 (9th Cir. 2010), ECF 131, CV07-703 PHX ROS, Approved 11/07/2011. In February 2012, Harkins announced that it expected to have all of its theaters equipped with closed captioning and audio description by the end of 2012. Press Release, Arizona Commission for the Deaf and Hard of Hearing, “Harkins Theatres announces closed captioning and descriptive narration devices” (Feb. 16, 2012), available at <http://www.acdhh.org/news/harkins-theatres-announces-closed-captioning-and-descriptive-narration-devices> (last visited July 14, 2014).

12182(a), of the screening of movies. *See* Brief for the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 15-16, *Harkins Amusement, supra*, (9th Cir. Feb. 6, 2009) (No. 08-16075).

C. Need for Department Action

1. Importance of Movies in American Culture

Going to the movies is a quintessential American experience. In any given month, over 56 million adults (roughly 26 percent of the adult population) make a trip to a movie theater to take in a movie. *See* Experian Marketing Services, *2010 American Movie-Goer Consumer Report*, available at <http://www.experian.com/blogs/marketing-forward/2010/02/20/2010-american-movie-goer-consumer-report/> (last visited July 14, 2014). Going to the movies is also an important social experience and pastime of teenagers and young adults. And while teenagers and young adults are more likely to go to the movies than older adults, adults over 50 outnumber young adults when it comes to raw number of moviegoers. *Id.* Moreover, going to the movies is also an important part of the American family experience. Long holiday weekends offer the movie industry some of the biggest box offices sales as families gather for the holidays and head out to the theaters together.

Movies are a part of our shared cultural experience, “water cooler” talk, and the subject of lunch-time conversations. The Supreme Court observed over 60 years ago that motion pictures “are a significant medium for the communication of ideas” and “may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.” *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). When

individuals who are deaf or hard of hearing or blind or have low vision have the opportunity to attend movies that they can actually understand because of the use of captions or audio description, they are exposed to new ideas and gain knowledge that contributes to the development of their communication and literacy.

The Department received numerous comments from individuals with these disabilities in response to its 2010 ANPRM describing how they were unable to take part in the movie-going experience with their friends and family because of the unavailability of captioning or audio descriptions. Many individuals felt that this not only affected their ability to socialize and fully take part in group or family outings, but also deprived them of the opportunity to meaningfully engage in the discourse that often surrounds movie attendance.

Commenters who have some functional degree of hearing, like those who use hearing aids or cochlear implants, explained that going to the movies is frustrating and unenjoyable for them. One commenter who wears a hearing aid and cannot benefit from assistive listening receivers currently provided in movie theaters said she often misses half the plot when she goes to a movie and has to rent the movie when it comes out on DVD so she can turn on the captions and learn what she has missed. Several other commenters also indicated that the assistive listening receivers available at movie theaters were only suitable for individuals with mild to moderate hearing loss.

2. Numbers of Individuals with Hearing and Vision Disabilities

According to 2010 census data, 7.6 million people reported that they experienced a hearing difficulty (defined as experiencing deafness or having difficulty hearing a normal conversation, even when wearing a hearing aid). Of those individuals, 1.1 million reported having a severe difficulty hearing. In addition, 8.1 million people reported having some degree of difficulty

seeing (defined as experiencing blindness or having difficulty seeing words or letters in ordinary newsprint even when normally wearing glasses or contact lenses). Of those individuals, 2.0 million reported they were blind or unable to see. See U.S. Census Bureau, U.S. Department of Commerce, P70-131, *Americans with Disabilities: 2010 Household Economic Studies* at 8 (2012), available at <http://www.census.gov/prod/2012pubs/p70-131.pdf> (last visited July 14, 2014). For people aged 65 or older, Census data indicated that 4.2 million had difficulty hearing (as defined by the Census), and 3.8 million reported having difficulty seeing (as defined by the Census). *Id.* As stated above, for several reasons it is unlikely that all people who reported having a vision or hearing disability to the Census would benefit from this rule. However, hearing and vision loss are highly correlated with aging, and as the U.S. population ages,¹⁴ the number of individuals with hearing or vision loss is projected to increase significantly. Research indicates that the number of Americans with a hearing loss has doubled during the past 30 years. See American Speech-Language-Hearing Association, *The Prevalence and Incidence of Hearing Loss in Adults*, available at http://www.asha.org/public/hearing/disorders/prevalence_adults.htm (last visited July 14, 2014). Experts predict that by 2030, severe vision loss will double along with the country's aging population. See American Foundation for the Blind, *Aging and Vision Loss Fact Sheet*, available at <http://www.afb.org/section.aspx?FolderID=3&SectionID=44&TopicID=252&DocumentID=3374> (last visited July 14, 2014). This increase will likely lead to a corresponding increase in the

¹⁴ The percentage of Americans approaching middle age or older is increasing. The 2010 Census found that during the decade spanning 2000 to 2010, the percentage of adults aged 45 to 64 years increased by 31.5 percent while the population aged 65 and over grew at a rate of 15.1 percent. By contrast, the population of adults between 18 and 44 grew by only 0.6 percent. U.S. Census Bureau, U.S. Department of Commerce, C2010BR-03, *Age and Sex Composition in the United States: 2010 Census Brief* 2 (2011), available at www.census.gov/prod/cen2010/briefs/c2010br-03.pdf (last visited July 14, 2014).

number of people who will need captioning or audio description. Not all these individuals will necessarily take advantage of the movie captioning and audio description that would be provided under this proposed rule, but a significant portion of this population would be eligible to directly benefit from this proposed rule (see, *infra*, section VI.A.3 for a more detailed discussion of the population eligible to receive benefits).

The Department believes that captioning will be used by some persons with moderate hearing loss as well as persons with severe hearing loss or who are profoundly deaf. Many individuals with hearing loss have difficulty discriminating among competing sounds in the movie and understanding what they hear, even if they can hear those sounds. Sounds from other patrons can also interfere with the ability of a patron with partial hearing loss to catch all the dialogue in a movie. Other individuals have difficulty understanding what is being said if the actors speak with foreign accents or have poor enunciation, and those patrons who rely even partly on lip reading will miss some dialogue because they cannot always see the actor's face. Individuals with hearing loss who have some level of improved hearing comprehension aided by hearing aids, middle ear implants, and cochlear implants, may also experience the same difficulty discriminating among competing sounds in the movie environment as those individuals with unaided partial hearing loss.¹⁵ It is critical that all of these individuals are not shut out of an emblematic part of our culture.

¹⁵ “While many people tend to think that the only factor in hearing loss is loudness, there are actually two factors involved: loudness and clarity. Loss generally occurs first in the high pitch, quiet range. A mild loss can cause one to miss 25-40% of speech, depending on the noise level of the surroundings and distance from the speaker. When there is background noise, it becomes difficult to hear well; speech may be audible but may not be understandable.” Hearing Loss Association of Oregon, *Facing the Challenge: A Survivor's Manual for Hard of Hearing People* (revised 4th ed. Spring 2011), at 8, available at http://www.hearinglossor.org/survivor_manual.pdf (last visited July 14, 2014). The degrees of hearing loss include: 1) Mild (25 to 40 dB): Faint or distant speech may be difficult; lip reading can be helpful; 2) Moderate (41 to 55 dB): Conversational speech can be understood at a distance of three to five feet; as much as 50% of discussions may be missed if the voices are faint or not in line of

3. Voluntary Compliance

Some movie industry commenters asserted that because Congress suggested a voluntary approach to accessibility for exhibiting movies in the 1989 and 1990 legislative history, when only burned-in open captions on separate prints of film were available, the Department should refrain from regulating in this area now and should simply continue to rely on voluntary compliance by the movie theaters. However, since that time, the technology to display open captions has evolved significantly and closed captioning technologies have been developed. Both of these developments are examples of the types of “technological advances” that have enhanced “options for making meaningful and effective opportunities available to individuals with disabilities.” H.R. Rep. No. 101-485, pt. 2, at 107. Commenters on the 2010 ANPRM advised the Department that despite these technological advances, even at that time, few movie theaters showed movies with captioning and audio description. In addition, these commenters advised the Department that in their experience, many theaters that had the capacity to show movies with captioning and audio description only did so for selected films shown at intermittent times.

In the three years since the Department last received public comment on these issues after the publication of its 2010 ANPRM (*see* discussion below), the number of movie theaters that are showing movies with closed captioning and audio description has increased as well as the times those captioned and audio described movies are shown each week. This described increase is attributable in some ways to settlements of Federal or State disability rights lawsuits brought

vision; 3) Moderately Severe (56 to 70 dB): Speech must be loud in order to be understood; group discussions will be difficult to follow; 4) Severe (71 to 90 dB): Voices may be heard from a distance of about 1 foot from the ear; and 5) Profound (more than 91dB): Loud sounds may be heard, but vibrations will be felt more than tones heard; vision rather than hearing, is the primary avenue for communication. *Id.*

by private plaintiffs or State attorneys general against individual movie theater companies in particular jurisdictions within the United States.¹⁶ Despite the success of private litigation in some areas of the country, closed captions and audio description are still not available for movies produced and distributed with these features at all theaters across the United States. The Department believes that access to movies for persons who are deaf or hard of hearing or are blind or have low vision should not depend upon where they live.¹⁷

Consequently, the Department believes it is in the interest of both the movie theater industry and persons with disabilities to have consistent ADA requirements for movie captioning and audio description throughout the United States and that this is best accomplished through revising the ADA title III regulation as proposed in this NPRM. The Department is persuaded that it should move forward with a regulation requiring captioning and audio descriptions so that the current and ever increasing numbers of individuals who are deaf or hard of hearing or blind or have low vision and who are unable to enjoy the goods and services offered by movie theaters can participate in this facet of American life.

¹⁶ See, e.g., Press Release, Illinois Attorney General, “Madigan Announces Settlement with AMC Theatres” (Apr. 4, 2012) available at http://illinoisattorneygeneral.gov/pressroom/2012_04/20120404.html (last visited July 14, 2014) (settlement providing for provision of captioning and audio technology in all AMC theaters in the state of Illinois); *Wash. State Comm’n Access Project v. Regal Cinemas, Inc.*, 290 P.3d 331 (Wash. Ct. App. 2012) (upholding trial court decision under Washington Law Against Discrimination requiring six theater chains to provide captions in the screening of movies in order to accommodate persons who are deaf or hard of hearing.); *Arizona v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 675 (9th Cir. 2010) (settlement agreement filed 11/07/2011 CV07-703 PHX ROS); Complaint, *Ass’n of Late-Deafened Adults v. Cinemark Holdings, Inc.*, No. 10548765 (Cal. App. Dep’t Super. Ct. filed Nov. 30, 2010) (complaint relating to settlement requiring Cinemark to provide closed captions in all its California theaters); Press Release, Cinemark Holdings, Inc., Cinemark and ALDA Announce Greater Movie Theatre Accessibility for Customers who are Deaf or Hard-of-Hearing (April 26, 2011), available at http://www.cinemark.com/pressreleasedetail.aspx?node_id=22850 (last visited July 14, 2014).

¹⁷ For example, it is the Department’s understanding that persons who live in communities served only by smaller regional movie theater chains are far less likely to have access to captioned and audio-described movies than individuals with disabilities who live in California, Arizona, or any of the major cities with theaters operated by Regal, Cinemark, or AMC. The Department bases this belief on its review of the information provided by Captionfish, which is a nationwide search engine that monitors which theaters offer both closed and open captions and audio description, and updates its Web site regularly. See Frequently Asked Questions, <http://www.captionfish.com/faq> (last visited July 14, 2014).

D. The Department's Rulemaking History Regarding Captioning and Audio Description

1. Rulemaking History Prior to the 2010 ANPRM

On September 30, 2004, the Department published an Advance Notice of Proposed Rulemaking (2004 ANPRM) to begin the process of updating the 1991 title II and title III regulations to adopt revised ADA Standards based on the relevant parts of the 2004 Americans with Disabilities and Architectural Barriers Act Accessibility Guidelines (2004 ADA/ABA Guidelines). 69 FR 58768. When the Department issued the 2004 ANPRM, it did not identify movie captioning or audio description as potential areas of regulation, but several commenters requested that the Department consider regulating in these areas.

Keeping in mind that the ADA's legislative history made clear that the ADA ought not be interpreted so narrowly or rigidly that new technologies are excluded, as the Department became aware of innovations in the field of captioning and audio description technology, it began to contemplate how these technologies might be incorporated into its ADA rules. The need for advancement in the area of access to movie theaters was necessary because assistive listening systems in movie theaters could not be used to effectively convey the audio content of movies for individuals who are deaf or who have severe or profound hearing loss. Additionally, there were no auxiliary aids being provided to individuals who are deaf to access the sound content of the movie or to individuals who are blind or have low vision to access the visual content of the movie. Accordingly, the Department decided to address the topic of requiring closed captioning and audio description (referred to as narrative description) at movie theaters in its June 17, 2008, Notice of Proposed Rulemaking (2008 NPRM). 73 FR 34508, 34530. In the 2008 NPRM, the Department stated that it was considering options under which it might require movie theaters to

exhibit movies that are captioned for patrons who are deaf or hard of hearing and provide audio description for patrons who are blind or have low vision.

The 2008 NPRM did not propose any specific regulatory language with regard to movie captioning or audio description, but asked whether, within a year of the revised regulation's effective date, all new movies should be exhibited with captions and audio description at every showing or whether it would be more appropriate to require captions and audio description less frequently. The preamble made clear that the Department did not intend to specify which types of captioning to provide and stated that such decisions would be left to the discretion of the movie theaters. The Department received many comments in response to its 2008 NPRM questions from individuals with disabilities, organizations representing individuals with disabilities, nonprofit organizations, state-governmental entities, and representatives from the movie industry (movie studios and movie theaters).

Individuals with disabilities, advocacy groups, a representative from a nonprofit organization, and representatives of state governments, including 11 State attorneys general, overwhelmingly supported issuance of a regulation requiring movie theaters to exhibit captioned and audio-described movies at all showings unless doing so would result in an undue burden or fundamental alteration. These groups noted that although the technology to exhibit movies with captions and audio description has been in existence for about 10 years, most movie theaters still were not exhibiting movies with captioning and audio description. As a result, these groups indicated that they believed regulatory action should not be delayed until the conversion to digital cinema had been completed.

Representatives from the movie industry strongly urged the Department not to issue a regulation requiring captioning, or if it did so, to delay the effective date so as to coincide with

the completion of conversion to digital cinema. They also objected to any requirement regarding audio description at movie theaters. Industry commenters also said that the cost of obtaining the equipment necessary to display closed-captioned and audio-described movies would constitute an undue burden.

For a more detailed discussion of the comments received in response to the 2008 NPRM, *see* 2010 ANPRM, 75 FR 43467 (July 26, 2010).

2. The 2010 Advance Notice of Proposed Rulemaking

The Department was not persuaded that strides made in making captioning and audio description technology available to moviegoers with disabilities were sufficient to make regulatory action in this area unnecessary. However, rather than issue a final rule, the Department issued a supplemental Advance Notice of Proposed Rulemaking (2010 ANPRM) on July 26, 2010, 75 FR 43467, for three reasons. First, the Department wished to obtain more information regarding several issues raised by commenters that were not addressed in the 2008 NPRM. Second, the Department sought public comment on several technical questions that arose out of comments on the 2008 NPRM. Finally, in the years since issuance of the 2008 NPRM, the Department became aware that movie theaters, particularly major movie theater chains, either had entered into, or had plans to enter into agreements with the movie studios to underwrite the conversion to digital cinema. During that same time period, however, the United States' economy and the profitability of many public accommodations experienced significant setbacks. The Department, among other things, wished to gather more information about the status of digital conversion, including projections about when movie theaters, both large and small, expected to exhibit movies using digital cinema, the percentage of movie screens expected to be converted to digital cinema by year, and any relevant protocols, standards, and equipment

that had been developed for captioning and audio description for digital cinema. In addition, the Department wanted to learn whether other technologies (*e.g.*, 3D) had developed or were in the process of development that either would replace or augment digital cinema or make any regulatory requirements for captioning and audio description more difficult or expensive to implement.

In the 2010 ANPRM, the Department explained that it was considering phasing in a requirement that 50 percent of movie screens offer captioning and audio description over a five-year period. The Department did not propose any regulatory language in the ANPRM.

In order to gather the necessary information and to determine how best to frame the regulation, the Department posed 26 questions in its 2010 ANPRM. These questions were divided into six general categories: coverage of any proposed rule; transition to digital cinema; equipment and technology for both analog and digital cinema movies; notice; training; and cost and benefits of captioning and audio description.

The Department conducted three public hearings to receive testimony on the 2010 ANPRM: the first in Chicago, Illinois, on November 18, 2010; the second in Washington, DC, on December 16, 2010; and the final hearing in San Francisco, California, on January 10, 2011. Each hearing included a full schedule of presenters, and many individuals came to listen to the various presentations.¹⁸ These public hearings were rebroadcast on-demand through the end of the comment period (January 24, 2011) and were streamed live on the Web to viewers across the country.

¹⁸ The Department issued four ANPRMs on July 26, 2010, and invited testimony on all four ANPRMs at each public hearing. *See* 75 FR 66054 (Oct. 27, 2010).

The number of comments submitted by the public in response to this ANPRM was extraordinary—the Department received over 1150 comments. Commenters included hundreds of individuals, both with and without disabilities, advocacy groups representing individuals with disabilities, 13 State attorneys general, movie industry representatives, and other organizations. Industry commenters asked that the Department not regulate at that time or, in the alternative, require that only 25 percent of movie screens that have converted to digital have equipment to display captioning or audio description. However, almost all other commenters supported a regulation requiring exhibition of movies with captioning and audio description. Significantly, even though the Department did not propose that captioning and audio description be provided at all showings, the vast majority of commenters who discussed this subject advocated that the Department do just that. In addition, most of these commenters stated that such a requirement should be implemented immediately rather than phased in over a five-year period. Industry commenters pointed out that rolling out captioning and audio description at 20 percent per year over a five-year period would be difficult to implement and that they supported a five-year compliance schedule.

III. General Issues

A. Current State of the Technology for Exhibiting Movies with Captioning and Audio

Description and Availability of Product

1. Captioning and Audio Description for Analog Movies

It is the Department's understanding, based upon independent research and the comments received in response to the 2010 ANPRM, that because of the major movie theater companies' commitment to the transition to digital cinema, research and investment into ways to deliver closed captioning has shifted away from analog movies to digital cinema. As such, there is only

one product currently available on the market for providing closed captions for analog movies: Rear Window[®] Captioning (Rear Window[®] or RWC). RWC, when combined with audio description provided by DVS-Theatrical[®] (DVS), is called MoPix[®] systems.¹⁹

Unlike open captions that are burned onto the film itself, Rear Window[®] captions (and audio description) are generated via a technology that is not physically attached to the film and does not require that a separate copy of the film be made. The Rear Window[®] and audio-description systems work through a movie theater's digital sound system using Datasat Digital Entertainment's media player with captioning subtitling system (formerly DTS Digital Cinema).²⁰ The Datasat[™] player sends the captions to a light-emitting diode (LED) display in the rear of the movie theater. A clear adjustable panel mounted on or near an individual viewer's seat reflects the captions correctly and superimposes them on that panel so that it appears to a Rear Window[®] user that the captions are on or near the movie image. This technology enables a movie theater that has been equipped with a Rear Window[®] Captioning system to exhibit any movie that is produced with captions at any showing, without displaying captions to every moviegoer in the theater. Thus, individuals who are deaf or hard of hearing may enjoy movies in a movie theater equipped with such a system alongside those who do not require captioning and who would not see the captions being displayed. Movie theaters can also exhibit movies with open captions for analog movies by using the same Datasat[™] system, with a second projector to superimpose the captioned text directly onto the movie screen.

¹⁹ The Department is not endorsing any product or company named in this NPRM. The Department is identifying particular companies and products to enable it to provide an understandable and comprehensive discussion of the issues, products, and available technology for captioning and audio description of movies.

²⁰ Digital sound systems operate independently from analog projectors, which deliver the visual portion of a movie. To exhibit closed captioning and audio description with analog movies, a movie theater needs a digital sound system. Many movie theaters that exhibit analog movies have these systems. Digital sound systems are different from digital cinema, *i.e.*, a movie theater does not need digital cinema to use digital sound.

Audio description makes movies more accessible to individuals who are blind or have low vision by providing narrated information about key visual elements of the movie, such as actions, settings, and scene changes. The audio description is sent by the Datasat™ media player to infrared or FM listening systems, then on to movie patrons wearing headsets.

According to comments from the WGBH National Center for Accessible Media (NCAM), as of mid-2010, MoPix® systems had been installed in more than 400 screens in the United States and Canada.²¹ Once a movie theater is equipped with a MoPix® system, captioning and description data are supplied on data disks, which arrive in advance of the film's debut. According to NCAM, virtually every major Hollywood studio participates in captioning and description of their A-title feature analog movies in one form or another, and many of the major exhibition chains, as well as many smaller chains, provide captions and descriptions regularly in some of their theaters.

The Department understands that while the industry is rapidly moving to digital cinema, some theaters, particularly very small independent movie theaters, may continue to exhibit analog movies as long as such a product remains available. The Department also understands that with the transition to digital cinema, a secondary market for closed-captioning equipment for analog movies may develop because some movie theaters may choose not to retain this equipment, thereby making the analog equipment cheaper to acquire.

Question 1a: Availability of Analog Film Prints

The Department is interested in any recent data available about the likelihood that analog film prints will be available after 2015 either from the major studios, from smaller independent

²¹ The WGBH National Center for Accessible Media is a nonprofit that developed MoPix® systems funded in part by a grant from the U.S. Department of Education.

studios, or from small independent filmmakers. What is the likelihood that analog film prints will be available in five years? Will analog versions of older movies continue to be available for second or third run showings? How many movies will continue to be produced in both analog and digital formats?

Question 1b: Availability of Movies with Captions and Audio Description

What percentage of currently available analog films has been produced with captions or audio description? How many movies will be produced with captions and audio description in both analog and digital formats? What is the likelihood that existing analog movies that currently do not have captions or audio description will be converted to digital formats and then only the digital format would have those accessibility features? Will those older analog movies that are currently available with captions continue to be available with captions?

Question 1c: Economic Viability of Analog Theaters

How many analog theatres currently show first-run movies? If first-run analog movies are no longer produced, will analog theaters be economically viable and what types of movies would these theaters rely on to generate revenue? How many analog theaters are likely to close as the result of these changes in the market? Will this rule affect the pace by which analog theaters convert to digital cinema? If so, how? Will analog theatres converting to digital cinema convert all screens at the same time?

2. Captioning and Description for Digital Cinema

Since publication of the 2008 NPRM, a significant change has occurred in the industry, both in terms of the technology available for digital cinema and the speed at which movie theaters are converting to digital cinema. With the move to convert to digital cinema systems, the technology and equipment available for these systems has expanded accordingly. Digital

cinema, which began to be developed in 2000, consists primarily of a digital server and a digital projector. The content of the digital movie can be distributed digitally, often using a hard drive, optical disks, or satellite.²² See, e.g., Michael Karagosian, *Accessibility in the Cinema* (June 3, 2010), available at http://www.mkpe.com/publications/d-cinema/presentations/2010-June_CHHA_Karagosian.pdf (last visited July 14, 2014). Unlike analog movies, digital cinema does not need splicing after delivery to the movie theater, thereby eliminating the risk of nicks to the film, and does not degrade over time or with repeated use. It also is “unlocked,” which means there are no technology-based royalties to be paid for distributing the content. *Id.* According to comments from NCAM, captions and audio description are included in the digital cinema package (DCP). The DCP contains the entire movie in electronic form (images, soundtrack, anti-piracy data, and if provided by the studios, captioning and description). When ordering a DCP, movie theaters have the option to request either an open-captioned or a closed-captioned version of the movie. If an open-captioned version is requested, no other equipment (such as an interface or personal user devices) is necessary in order to display a movie with the captions exhibited.

As digital cinema technology has advanced, the options and methods available for exhibiting movies with captioning and audio description have also expanded. Members of the industry, manufacturers, and other interested parties worked together to ensure interoperability of digital cinema components through standards adopted by the Society of Motion Picture and Television Engineers (SMPTE), so that products that provide captioning and audio description would be compatible with the various digital cinema systems available for purchase and use by

²² Because digital movies can be provided to movie theaters easily and inexpensively compared to the costs inherent in mailing several large reels of film per analog movie, the cost to distribute digital movies is significantly less for movie studios.

movie theaters.²³ For this and other reasons, in digital cinema systems it is much easier and far less costly to exhibit movies with captioning and audio description. For example, unlike analog movies, digital cinema has many sound channels, making it much easier to include audio description. See Michael Karagosian, *Accessibility in the Cinema* (June 3, 2010), available at http://www.mkpe.com/publications/d-cinema/presentations/2010-June_CHHA_Karagosian.pdf (last visited July 14, 2014). In addition, digital cinema can easily support closed captions, including up to six closed-captioned languages at a time. *Id.* And for closed captions, a standardized output is available that permits the closed captioned product to plug in to any compliant digital system. *Id.*

In terms of equipment needed, it is easier to exhibit movies in digital cinema using open captions because all that is required is that the captions be turned on. No additional equipment (e.g., individual captioning devices) is needed to display open captioned movies. Open captions, like closed captions, are included in the DCP and the movie theater simply requests a DCP with either open or closed captions.

Based upon the Department's research, conversations with manufacturers, and comments received by the Department, several options appear to be available for delivering closed captions in digital films to the movie patron. For example, two manufacturers produce and sell wireless closed-captioned displays that are mounted on a device that the movie patron places in the seat's cup holder. See Michael Karagosian, *Update on Digital Cinema Support for Those with*

²³ "Closed caption technology for digital cinema has rapidly moved forward with the successful standardization of SMPTE 430-10 and 430-11 for the SMPTE CSP/RPL closed caption protocol, an Ethernet-based protocol designed for connecting closed caption systems with digital cinema servers. The SMPTE CSP/RPL communication protocol is license-free. The wide-spread use of this protocol has allowed multiple closed caption systems to proliferate." Michael Karagosian, *Update on Digital Cinema Support for Those with Disabilities: April 2013*, available at http://www.mkpe.com/publications/d-cinema/misc/disabilities_update.php (last visited July 14, 2014).

Disabilities: April 2013, available at http://www.mkpe.com/publications/d-cinema/misc/disabilities_update.php (last visited July 14, 2014). One system uses a single infrared transmitter for delivery of both closed captions and audio description. *Id.* A second system uses Wi-Fi technology to transmit closed captions directly from the server to a cup holder display unit. This system does not appear at this time to support audio description. However, according to its manufacturer, audio description can be provided through a third-party vendor system. The Department understands that cup holder displays are already in use in theaters in Canada as well as some theaters in the United States. Eyeglasses that display the text in front of the wearer's eye while watching a movie are also on the market. As of September 2012, Regal Cinema theaters had captioning glasses in use in 200 theaters and announced that it plans to use them in all of its theaters by April 2013. Other companies are also reported to be developing eyeglasses that can display captions. In addition, the Department understands that MoPix's[®] Rear Window closed-captioned devices work in digital cinema as well as analog. Movie theaters that have installed a captioning system for their analog product can still use that product with digital cinema. MoPix[®]'s devices are supported by several digital cinema servers directly, although other servers may need to obtain a special interface.²⁴

In specialty movie theaters, such as IMAX or other big-screen format presentations, closed-captioning systems for digital cinema also work well, and the captioned data can be fed to the LED panel by a computer that is running special software that synchronizes the caption files to the film.

²⁴ As with all closed-captioning systems available with today's technology, MoPix[®] also requires use of an individual captioning device by the patron seated in the theater auditorium.

It is unclear from the comments received by the Department the extent to which 3D movies are currently being provided by studios or distributors with open or closed captioning.

Commenters representing both movie theaters and movie studios stated that MPAA member companies are hopeful that technological developments will soon allow closed captioning for 3D version releases. A commenter involved in the development of the Rear Window[®] captioning system for analog movies stated that it has been tested in feature-length 3D presentations with positive viewer response. The Department's research indicates that both the captioning eyeglasses as well as the cup holder displays can show captions for 3D movies if the movies are provided with captioning. By contrast, the Department understands that the same technology provides audio description for both 2D and 3D movies. One commenter representing the movie theater industry stated that whenever audio description is available for digital 3D movies, it should be treated the same as audio description for film and video displays in other settings.

As with analog movies, the audio description in digital cinema is delivered using a wireless headset or ear phones. Digital cinema audio supports up to 16 channels of audio²⁵ and the cinema audio formats have two channels reserved for both hearing impaired audio and audio description. See Michael Karagosian, *Accessibility in the Cinema* (June 3, 2010), available at http://www.mkpe.com/publications/d-cinema/presentations/2010-June_CHHA_Karagosian.pdf (last visited July 14, 2014). Moreover, both the infra-red and FM-audio single-channel systems presently used for assisted listening can be replaced by multi-channel systems that support both assisted listening and audio description.

²⁵ Analog movies support between two and eight channels, depending upon the audio sound format being used by the movie theater. See Michael Karagosian, *Accessibility in the Cinema*, (June 3, 2010), available at http://www.mkpe.com/publications/d-cinema/presentations/2010-June_CHHA_Karagosian.pdf (last visited July 14, 2014).

3. Conversion to Digital Cinema

Despite the economic downturn over the last few years, the movie theater industry is rapidly increasing the number of screens that have converted to digital cinema since publication of the 2008 NPRM. In May 2013, an industry representative testified to Congress that as of that date, 88 percent of indoor movie screens in the United States had converted to digital cinema. *See* Testimony of John Fithian, President and CEO of the National Association of Theater Owners, Before the U.S. Senate Committee on Health, Education, Labor and Pension (May 14, 2013), available at <http://natoonline.org/wp-content/uploads/2013/08/Harkin-Hearing-Testimony-May-2013.pdf> (last visited July 14, 2014).

Starting in the late 2000's, a number of major movie studios entered into agreements to help defray the cost of conversion by paying a consortium of movie theater chains a "virtual print fee" of \$800 to \$1000 per film, per screen until the digital equipment is paid off. *See* Dawn C. Chmielewski, *Major Studios Agree to Back Switch to Digital Projection*, *Los Angeles Times* (Oct. 2, 2008), available at <http://articles.latimes.com/2008/oct/02/business/fi-studios2> (last visited July 14, 2014). The Department understands that nearly all of these programs have stopped enrolling new members, although the deals continue to be active for those who have already signed up. According to an industry commenter, these digital cinema systems are SMPTE-compliant, which means that all of the captioning and audio-description products on the market—and in development—will be compatible with, and easily integrated into, whatever digital cinema systems are in use by the various movie theaters. In addition, it has recently been reported that between the conversion to digital and the projected loss of the two major suppliers of film print stock, it is unlikely that any first run films will be available in analog within the next few years, thus furthering the pressure on smaller theaters to convert to digital. *See e.g.*, Gendy Alimurung,

Movie Studios Are Forcing Hollywood to Abandon 35mm Film. But the Consequences of Going Digital Are Vast, and Troubling, *LA Weekly* (Apr. 12, 2012), available at <http://www.laweekly.com/2012-04-12/film-tv/35-mm-film-digital-Hollywood> (last visited July 14, 2014); Dawn McCarty & Beth Jinks, *Kodak Files for Bankruptcy as Digital Era Spells End to Film*, *Bloomberg* (Jan. 19, 2012), available at <http://www.bloomberg.com/news/print/2012-01-19/kodak-photography-pioneer-files-for-bankruptcy-protection-1-.html> (last visited July 14, 2014); see also Tim O'Reiley, *Theater Official Optimistic Despite Attendance Slump*, *Las Vegas Review-Journal* (March 29, 2011) (quoting new MPAA head, former Sen. Christopher Dodd, as predicting that “films on film will disappear in less than three years”), available at <http://www.reviewjournal.com/business/theater-official-optimistic-despite-attendance-slump> (last visited July 14, 2014).

4. Availability of Movies with Captioning and Audio Description

As stated previously, movie theaters do not provide the captioning and audio description for the movies they exhibit. Movie studios and distributors determine whether to caption and audio describe, what to caption and audio describe, the type of captioning to use, and the content of the captions and audio-description script. In addition, movie studios and distributors assume the costs of captioning and describing movies. Movie studios and distributors would not be required by this proposed regulation to include captioning or audio description in their product, because the mere production and distribution of movies does not make them public accommodations under the ADA. That said, movie studios appear committed to making their movies accessible to individuals who are deaf or hard of hearing or blind or have low vision, and the Department commends their efforts. According to the MPAA, analog movies produced with captioning by

member studios in 2010 included virtually all wide-releases.²⁶ Seventy-six percent of analog movies produced by MPAA member studios were produced with audio description. According to another industry commenter, MPAA member studios distributed 140 films in 2010, captioning 86 percent of their film product. The MPAA, in its comments to the 2010 ANPRM, stated that by the latter part of 2010, the major studios were making captioning and audio description available on some digital movies and had announced that in 2011 almost all theatrical releases in digital format will include closed captioning.²⁷ In addition, the MPAA stated in its comments that its members intend to significantly increase the number of digital releases with audio description in 2011. No data are publicly available on the number of movies released with captioning and audio description since 2011, but given the current trend, the Department projects that the numbers increased in 2012. One movie theater industry commenter pointed out that while MPAA member studios distributed 140 movies in 2010, the independent studios released 473 films, a majority of which were not captioned or audio described. The number of independent films released can be somewhat deceptive in this context, however, because MPAA member studios distribute 82 percent of the film product in the United States. The larger independent studios, which include Dreamworks, Lionsgate, Summit, The Weinstein Company, and MGM, distribute an additional 14 percent of the domestic product, and the other independent studios distribute the remaining 4 percent of the product domestically. It is unclear how many movies that are captioned and audio described are currently distributed by the independent

²⁶ Wide-releases include all films except for those with limited release, documentaries, and similar titles.

²⁷ This commitment was possible because the interested parties reached agreement upon, and published standards for, SMPTE digital cinema packages.

studios.²⁸ It is also unclear whether, and what percentage of, movies will be made in digital format for digital cinema by these same independent studios in the future, and what percentage will be captioned and audio described. However, if independent producers distribute their product to television, albeit in analog or digital format, captions must be included under current FCC rules. *See* 47 CFR 79.1.

Despite the array of captioned and described product that is available, there are still a significant number of movie theaters that are not equipped to show movies with closed movie captions and audio description or that only show them at selected showings of particular movies. According to NATO, as of May 2013, at least 53 percent of digital movie screens had the capacity to show movies with closed movie captions or audio description. *See* Testimony of John Fithian, President and CEO of the National Association of Theater Owners, Before the U.S. Senate Committee on Health, Education, Labor and Pension (May 14, 2013), available at <http://natoonline.org/wp-content/uploads/2013/08/Harkin-Hearing-Testimony-May-2013.pdf> (last visited July 14, 2014). Three of the four largest movie theater chains have publicly committed to installing closed captioning and audio description equipment in all of their theaters that have been converted to digital. *See* Press Release, Regal Entertainment Group, Regal Entertainment Group Announces New Forms of Digital Cinema Access (May 4, 2011), available at <http://investor.regmovies.com/phoenix.zhtml?c=222211&p=irol-newsArticle&ID=1559531&highlight> (last visited July 14, 2014); Press Release, Cinemark Holdings, Inc., Cinemark and ALDA Announce Greater Movie Theatre Accessibility for Customers who are Deaf or Hard-of-Hearing (April 26, 2011), available at

²⁸ Representatives from the Independent Film & Television Alliance and from independent studios did not submit comments in response to the 2010 ANPRM.

http://www.cinemark.com/pressreleasedetail.aspx?node_id=22850 (last visited July 14, 2014); Press Release, Disability Rights Advocates, AMC Theatres and ALDA Announce Greater Accessibility for Deaf or Hard-of-Hearing Guests at All Digital Movie Theatres in California, (Dec. 20, 2011), available at <http://www.dralegal.org/pressroom/press-releases/amc-theatres-and-ALDA-announce-greater-accessibility-for-deaf-or-hard-of> (last visited July 14, 2014).

IV. Section-by-Section Analysis

Section 36.303(g) Movie Captioning and Audio Description—Definitions

Movie Theater. In order to make it clear which facilities are subject to the specific captioning and audio-description requirements set forth in § 36.303(g), the Department is proposing in § 36.303(g)(1)(v), to define the term “movie theater” as “a facility other than a drive-in theater that is used primarily for the purpose of showing movies to the public for a fee.” Movie theaters include all movie theaters that exhibit movies for a fee, except drive-in movie theaters. The term includes movie theaters that exhibit second- and third-run movies as well first-run releases. The term is not a synonym for movie screen. A movie theater can have one or more screens available to show movies in several auditoriums. The term “movie theater” does not include facilities that screen movies, such as museums, hotels and resorts, or cruise ships, even if they charge an additional fee, if the facility is not used primarily for the purpose of showing movies for a fee.

Paragraph 36.303(g) is a specific application of the auxiliary aid and service requirement for movie theaters. Such a provision is necessary because of the technological advances in auxiliary aids and services that enable movie theaters to screen movies in a manner that provides effective communication to individuals who are deaf or hard of hearing or blind or have low vision. The Department’s title III regulation makes clear that public accommodations that

exhibit movies but are not movie theaters, such as museums and amusement parks, must provide effective communication to the public through the provision of auxiliary aids and services, including, where appropriate, captioning and audio description. *See generally* 28 CFR 36.303; 28 CFR part 36, app. B. Many such public accommodations have been providing appropriate auxiliary aids, either through open captions, closed captions, or a mix of the two, and audio description. Even in situations in which the Department identified a need for enforcement action, these public accommodations were willing to comply with the ADA and provide such auxiliary aids and services. *See, e.g.,* Press Release, U.S. Department of Justice, *Settlement Agreement Will Ensure Accessibility at the International Spy Museum in Washington, D.C.* (June 3, 2006), available at <http://www.justice.gov/opa/pr/2008/June/08-crt-489.html> (last visited July 14, 2014); Press Release, U.S. Department of Justice, Walt Disney World Co. Agrees to Provide Services to Deaf and Hard-of-Hearing Guests (Jan. 17, 1997), available at <http://www.justice.gov/opa/pr/1997/January97/021cr.htm> (last visited July 14, 2014).

Commenters on the 2010 ANPRM advised the Department that the technology does not yet exist to exhibit movies with closed captions or audio description at drive-in movie theaters that have an outdoor patron field that is typically spread across more than eight acres. In addition, these comments indicated that given that there are fewer than 400 drive-in theaters in the United States, it is unlikely that such technology will be developed in the near future. Thus, the Department is proposing to exclude drive-in movie theaters from the definition of movie theater in this rule and defer rulemaking regarding drive-in theaters until such time that the necessary technology for closed captions and audio description for drive-in theaters becomes commercially available.

Question 2: Does the proposed definition of “movie theater” adequately describe the movie theaters that should be covered by this regulation? Are there any non-profit movie theaters that would be covered by this definition? How many non-profit movie theaters are there? Should drive-in movie theaters be excluded from the definition of movie theaters at this time? Is there technology under development that might make it possible for drive-in movie theaters to provide closed captions or audio description in the future?

Audio description. For the purposes of this subsection, the Department is proposing to add a definition for “audio description.” In proposed § 36.303(g)(1)(i), “audio description” is defined as the “provision of a spoken narration of key visual elements of a visually delivered medium, including, but not limited to, actions, settings, facial expressions, costumes, and scene changes.”

In the Department’s July 26, 2010, ANPRM, the Department used the term “video description” to define the process and experience whereby individuals who are blind or have low vision are provided with a spoken narrative of key visual elements of a movie, such as actions, settings, facial expressions, costumes, and scene changes. The Department received several comments addressing whether it should continue to use the term “video description” or other terms, including “audio description.” The majority of commenters addressing this issue supported the use of the term “audio description,” stating that audio description has been used since 1981 as the term of art to describe using language to provide access to visual images, and pointing out that the National Endowment for the Arts and the Graphic Artists Guild both use the logo “AD” to indicate the availability of audio description. In addition, audio description more appropriately describes the type of auxiliary aid involved, because the process involves providing information that is experienced aurally. In response to these comments, the

Department has been persuaded to change the nomenclature for this process to “audio description.”

Question 3: Should “audio description” be the nomenclature adopted in the final rule?

Closed movie captioning. The Department notes that the term “closed captioning” is referenced in the examples of auxiliary aids and services in § 36.303(b). That section refers to “closed captioning” in the much broader context of auxiliary aids and services that must be provided by a wide range of public accommodations subject to title III. In order to distinguish between the general auxiliary aid and service requirement and the “closed captioning” that is required by § 36.303(g)(2), the Department is proposing to define the term “closed movie captioning” specifically as it applies to movie theaters. In § 36.303(g)(1)(ii), the Department proposes to define “closed movie captioning” as “the written text of the movie dialogue and other sounds or sound making (*e.g.*, sound effects, music, and the character who is speaking). Closed movie captioning is available only to individuals who request it. Generally, it requires the use of an individual captioning device to deliver the captions to the patron.”

The Department received one comment encouraging it to use the term “individual captioning” instead of “closed captioning” to refer to the circumstances where captions are received through the use of individual devices. This commenter distinguished between three types of captioning: open captioning, where the captions are displayed on the screen and cannot be turned off; closed captioning as the term is used in the context of television and video where the captions can be turned on or off, but when they are displayed everyone in the room sees them; and individual captioning systems, where only the individual viewer sees the captions, but they are not displayed to the entire audience. As stated earlier, the Department wishes to avoid confusion between the “closed captioning” provided on television and in other venues, and those

provided in movie theaters. However, it believes its proposed term “closed movie captioning” will address that concern without introducing a term that is wholly different from that currently used by the movie industry and the courts.

Question 4: Should the Department use the term “closed movie captioning” to refer to the type of captioning provided by movie theaters to individuals who view the captions at their seats? Is there a different term that should be used in order to distinguish between the closed captioning referred to in § 36.303(b) and the captioning required for movie theaters in proposed § 36.303(g)(2)?

Individual audio description listening device. In § 36.303(g)(1)(iii), the Department is proposing to define “individual audio description listening device” as the individual device that patrons may use at their seats to hear audio description.

Individual captioning device. In § 36.303(g)(1)(iv), the Department is proposing to define “individual captioning device” as “the individual device that patrons may use at their seats to view the closed captions.”

Open movie captioning. The Department notes that the term “open captioning” is already referenced in the examples of auxiliary aids and services provided in § 36.303(b). That section refers to “open movie captioning” in the much broader context of auxiliary aids and services that must be provided by the wide range of public accommodations subject to title III. In order to distinguish between the general auxiliary aid requirement and the “open captioning” that is referenced in § 36.303(g)(2)(ii), the Department is proposing to define the term “open movie captioning” specifically as it applies to movie theaters. In § 36.303(g)(1)(vi), the Department proposes to define “open movie captioning” as “the provision of the written text of the movie

dialogue and other sounds or sound making in an on-screen text format that is seen by everyone in the theater.”

Question 5: Should the Department use the term “open movie captioning” to refer to the type of captioning that is viewed on or near the movie screen by everyone in the movie theater audience? Is there a different term that should be used?

Movie Captioning Coverage

The Department asked nine questions in its 2010 ANPRM on the scope of coverage and how best to frame any regulation requiring exhibiting movies with closed captions and audio description. In that ANPRM, the Department stated it was considering proposing a regulation that would require that 50 percent of movie screens exhibit movies with captioning and audio description and that any such requirement would be phased in over a five-year period. However, after review and analysis of the statutory structure of the ADA, its regulatory requirements and legislative history, and the technological advances since enactment of the ADA, the Department is convinced that any regulation regarding captioning and audio description should be written broadly, like the ADA itself.

In the NPRM, § 36.303(g)(2)(i), the Department proposes to require that “[a] public accommodation that owns, leases, leases to, or operates a movie theater shall ensure that its auditoriums have the capability to exhibit movies with closed movie captions. In all cases where the movies it intends to exhibit are produced, distributed, or otherwise made available with closed movie captions, the public accommodation shall ensure that it acquires the captioned version of that movie. Movie theaters must then exhibit such movies with closed movie captions available at all scheduled screenings of those movies.” As discussed below, the Department is proposing to apply this requirement to all digital movie screens in movie theaters and is seeking

public comment as to the best approach (*i.e.*, delayed compliance date or deferral) to take with respect to analog movie screens.²⁹

The Department is proposing that all movies available with captioning be exhibited with captioning at all times unless doing so would be an undue burden.³⁰ The primary goals of the ADA are to assure equality of opportunity and full access and participation in our society for individuals with disabilities. 42 U.S.C. 12101. To that end, and as stated previously, the ADA prohibits public accommodations such as movie theaters from affording individuals with disabilities an unequal or lesser service than that offered to other individuals. 42 U.S.C. 12182(b)(1)(A)(ii). The ADA requires public accommodations “to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently * * * because of the absence of auxiliary aids and services,” unless the public accommodation can demonstrate that taking such steps would result in a fundamental alteration or undue burden. 42 U.S.C. 12182(b)(2)(A)(iii).

The ADA envisions that effective communication through the provision of appropriate auxiliary aids and services be provided for all of a public accommodation’s services and that

²⁹ Some commenters to the 2010 ANPRM recommended that the Department delay proposing any new rule for at least 24 months as the digital transition continues to progress and new technologies become more widespread. It is already more than 3 years since the ANPRM was published, and the Department declines to delay this rulemaking any further.

³⁰ A requirement that all movies available with closed captioning be exhibited with closed captioning at all times eliminates other problems inherent in any partial requirement (be it 50 percent of screens in a facility, 50 percent of screens owned by a particular movie theater, number of movies being screened in a particular theater facility, *etc.*) because of issues involving availability of products with captioning and audio description and how movie theaters use auditoriums. Movie theaters negotiate with film distributors regarding which auditoriums in a multiplex theater will show which films. Generally, if a film is expected to be very popular, it will open in the largest auditorium or in several auditoriums within the same complex. As the popularity decreases, the film will be moved from larger auditoriums to smaller auditoriums and from multiple auditoriums to single auditoriums. The timing of such moves will vary from theater to theater and from film to film. Movies also can be rotated between screens throughout the day and evening. The Department’s proposal to require 100 percent of screens to meet the requirement ensures that if movies are available with closed captioning, they will be exhibited with closed captioning, thereby maximizing options and choices for patrons with disabilities for all movies, at all times, throughout the country, and eliminates the confusion and lack of access that a partial requirement would create.

individuals who are deaf, hard of hearing, blind, or have low vision have access to all of a public accommodation's services, absent a legitimate defense. As such, it is not enough to offer captioned movies (or movies with audio description) for limited movies at limited times, absent a legitimate defense. Rather, such individuals should be able, along with the rest of the population, to attend a movie at any date and time. Based on the information it currently has, the Department does not believe it would be appropriate to propose an across-the-board phase-in of this requirement over five years. Information available to the Department since the publication of the ANPRM makes it clear that the pace of conversion to digital cinema has accelerated rapidly and there are a number of different options available for providing closed movie captions and audio description. Therefore, at this time, the Department does not believe that it is necessary to delay the implementation of the final rule for digital movie screens.

The Department's proposed provision would impose a three-fold requirement upon movie theaters. First, as of the compliance date of this rule, movie theaters must have the capacity to exhibit movies with captions. Second, if a movie is available with captions because it has been produced, distributed, or otherwise made available with captioning, then movie theaters are required to obtain that particular movie in a version with captions, and not in a version without captions. Third, those movie theaters are required to display that movie with the captions to patrons upon request.

The first proposed requirement mandates that movie theaters acquire whatever equipment they need to have the capability to exhibit movies with closed captions. The second proposed requirement mandates that movie theaters select the captioned version of a movie if captions are available for that particular movie. It does not limit the selection or mix of movies that a movie theater may choose. In other words, if a particular movie is not available with captioning

(because it has not been produced, distributed, or otherwise made available to the movie theater with captions), then the movie theater is in no way limited or prohibited from acquiring or exhibiting that particular movie. In addition, if a movie is available in both analog and digital formats, but only available with captions in the digital format, then a theater with both digital and analog screens is not required to obtain the captioned digital version if it had intended to show that particular movie on its analog screens. In addition, this proposed rule does not require theaters to add captions to movies that are only available from studios/distributors without captions. Finally, the third proposed requirement only relates to the exhibition of movies obtained with captioning available. The Department understands that decisions about which movies to release with captions or audio description and whether open or closed captions or audio description are provided for a particular movie are decisions made by movie studios and distributors, not movie theaters. The Department notes that obtaining a captioned version of a movie does not require a theater to search for accessible versions of movies because it is the Department's understanding that each movie (either with or without captions) is only available through a single distributor. We have no information that suggests that, in the future, particular movies will be available through multiple distributors and that some distributors may have versions with closed captioning and audio description features and others may not.

Even if that particular movie may be the only movie that a movie theater chooses to exhibit at that time throughout all its auditoriums, there is no obligation under this proposed regulation to exhibit the movie with captioning or audio description if it is not made available with these features. If a movie is available with captioning but not with audio description, then the movie must be exhibited with the captions whenever a request for the captions is made, but the requirement for audio description would not apply to the showing of that movie. This proposed

rule would ensure that movie theaters have the capability to exhibit movies that are produced or distributed with captioning and audio description available and that they exhibit such movies with captioning and audio description whenever a request is made for these auxiliary aids.

Comments from NATO on the ANPRM suggested that if the Department issues a regulation requiring captioning then it should not phase-in compliance over five years, but instead should give large, digital theaters five years until they have to comply. NATO also recommended that the Department reduce the required number of screens that need to be accessible to 25 percent and only apply that requirement to movie theaters undergoing digital conversion. NATO also objected to a captioning and audio-description requirement for movie theaters that do not convert to digital, citing uncertainty as to whether many first-run analog movies will be produced in the future, or whether any of them will be distributed with captions and audio description.

As stated earlier, the Department does not believe it appropriate to propose that captioning or audio description be available in less than 100 percent of the movie theaters that exhibit movies that are produced, distributed, or otherwise made available with captioning or audio description. Moreover, there are two reasons that Department does not believe a phased-in compliance schedule is appropriate. First, as discussed in the section on the legal basis for the rule, and as recognized by the Ninth Circuit in the *Harkins* case, movie theaters already have an obligation to provide effective communication to persons with disabilities 100 percent of the time. Second, as the industry acknowledged in its comments on the 2010 ANPRM, a rolling compliance period is difficult to implement given the way the market works—*i.e.*, it is not easy to purchase and install equipment on a set rolling schedule. In addition, as discussed earlier, the Department understands that at least 53 percent of movie screens already have the necessary

equipment to show captions and provide audio description and three of the four largest movie theater companies have already committed to make captioning and audio description available at 100 percent of their theaters, as have several smaller movie theater companies.

The Department is proposing that the rule take effect for movie screens that have already converted to digital six months from the publication date of the final rule in the **Federal Register**. The Department believes six months is sufficient time for theaters that have already converted to digital to order and install the necessary equipment to provide captions and audio description, train employees on how to use the equipment and assist patrons in using it and develop and implement processes to ensure that all communications and advertisements intended to inform potential patrons of movie showings provide information regarding the availability of captioning and audio description for each movie.

The rule does not propose a compliance date for analog movie screens. As discussed below, because of the uncertainty about the future of analog theaters, and the future availability of analog film, the Department is seeking public comment on whether it should adopt a four-year delayed compliance date for analog movie screens, or whether it should defer coverage of analog screens and consider additional rulemaking at a later date.

The six-month compliance date applies to digital screens in all movie theaters, including a theater that has both analog and digital screens. For example, if a movie theater has 20 screens and 18 of them are digital and two are analog, the 18 digital screens are all subject to the six-month compliance date. In addition, the NPRM proposes that if an analog screen is converted to digital after the rule's six-month compliance date for digital screens, the newly converted digital screen will then be subject to the rule's requirements within six months from the date the screen is converted to digital.

In addition, from the law's inception in 1990, the statutory language of the ADA has provided flexibility based on cost in specific circumstances. All movie theaters, regardless of size, status of conversion to digital cinema, or economic viability, have available to them the same defense as do all other public accommodations—the individualized and fact-specific undue burden defense. The undue burden defense tailors the analysis to factor in the needs and resources of small businesses and the economic viability of those businesses. Throughout the last two decades movie theaters have been able to assert this defense when facing litigation alleging a failure to provide effective communication to patrons with disabilities. This regulation does not change the availability of this defense or the circumstances under which it can be asserted. It does, however, provide clarity about how movie theaters can meet their longstanding effective communication obligations under the ADA.

The Department notes that even if a movie theater cannot install the equipment in all of its auditoriums due to an undue financial burden, the movie theater is still obligated to take steps to maximize the movie choices for customers who are deaf or hard of hearing or blind or have low vision. Maximizing the movie choices means that movie theaters should, to the extent possible based on the movie theaters' resources, be able to exhibit as many movies as possible with captioning and audio description in their auditoriums, throughout the day and evening, and on both weekdays and weekends. If, for example, a six-screen movie theater can only afford to install captioning equipment in half of its auditoriums, and it has auditoriums with different capacity, it should install captioning equipment in large, medium, and small auditoriums. This distribution of equipment would permit exhibition of different types of movies, as blockbusters

generally are shown in larger auditoriums first and smaller budget movies or older movies may be shown only in medium or small auditoriums.³¹

Question 6: Consistent with President Obama's Memorandum issued on January 18, 2011, on regulatory flexibility, small business, and job creation, the Department invites comment on ways to tailor this regulation to reduce unnecessary regulatory burdens on small businesses.³² For example: Should the Department have a different compliance schedule or different requirements for digital or analog theaters that have annual receipts below a certain threshold? If so, what should the schedule, requirements, or financial threshold be? Or, should the final rule have a different compliance schedule or requirements for single-screen or miniplex analog or digital theaters? Will all mega and multiplex theaters have converted to digital by the time the final rule goes into effect? Is a four-year compliance date reasonable for those screens that will remain analog? Please provide information to support your answer. Should the Department adopt a different compliance schedule or different requirements for nonprofit movie theaters? The Department invites comment on these alternatives and any other ways in which the final rule could be tailored to appropriately minimize costs on small theaters.

Question 7: Is the proposed six-month compliance date for digital screens a reasonable timeframe to comply with the rule? Is six months enough time to order, install, and gain familiarity using the necessary equipment; train staff so that they can meaningfully assist patrons; and meet the notice requirement of the proposed rule? Will manufacturers have the

³¹ Existing § 36.303(g) states that “[i]f provision of a particular auxiliary aid or service by a public accommodation would result * * * in an undue burden * * * the public accommodation shall provide an alternative auxiliary aid or service, if one exists, that would not result in * * * such a burden but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation.”

³² Memorandum for the Heads of Executive Departments and Agencies, Regulatory Flexibility, Small Business, and Job Creation, 76 FR 3827 (Jan. 18, 2011).

capacity to provide the necessary equipment for captioning and audio description as of the six-month proposed compliance date of this rule for digital movie screens? If the proposed six-month date is not reasonable, what should the compliance date be and why? Please provide specific examples, data, or explanation in support of your responses.

Analog Movie Screens

Based on information currently available, it appears likely that few, if any, analog movies will continue to be made by the major movie studios and possibly by the independent studios as well. See previous discussion. It is unclear to the Department, however, whether those analog movies that continue to be made will be produced with captions and audio description. Thus, it could be that even if analog theaters were to have the capability of showing movies with captions and audio description, there may not be any movies for them to show with those accessibility features. It is also unclear how many, if any, analog theaters will continue to be viable within the next few years. The Department has asked for public comment on the future of analog theaters, analog movie production in general, and analog movies with accessible features. Based on the information available to the Department at the time it drafts the final rule, the Department will decide whether it is appropriate to just delay compliance for analog screens in movie theater auditoriums in order to allow sufficient time to comply with the specific requirements of the rule or defer applying these specific requirements altogether until such time that the Department, in light of available information, deems it appropriate to engage in further rulemaking on this subject. The Department is interested in public comment on whether there is a reasonable basis for deferring the application of this rule to movie theater auditoriums with analog screens or whether it should include an extended compliance date.

Question 8: Should the Department adopt a four-year compliance date for analog movie screens (Option 1) or should it defer application of the rule's requirements to analog screens for now and consider additional rulemaking with respect to analog screens at a later date (Option 2)? Commenters are encouraged to provide information to support their recommendation.

Open Captioning (or Other Technologies) as an Option for Compliance

In Question 9 of the 2010 ANPRM, the Department asked whether it should give movie theaters the discretion to exhibit movies with open captions should they so desire, as an alternate method of achieving compliance with a captioning regulation. Many of the commenters who addressed this issue, including those from the industry, supported this option.³³ The Department decided to include this option in the proposed regulation as an example of an alternative means of meeting the movie theaters' obligation to provide effective communication to patrons who are deaf or hard of hearing but in keeping with the ADA's legislative history, we are making it clear that the ADA does not require movie theaters to use open captions as a means of providing effective communication.³⁴ In the NPRM, § 36.303(g)(2)(ii) states that "[m]ovie theaters may meet their obligation to provide captions to persons with disabilities through use of a different technology, such as open movie captioning, so long as the communication provided is as effective as that provided to movie patrons without disabilities. Open movie captioning at some or all showings of a movie is never required as a means of compliance with this section, even if it

³³ A number of commenters advocated for the Department to require open captioning exclusively, arguing that it is much more effective and cheaper than closed captioning.

³⁴ "Open captioning * * * of feature films playing in movie theaters, is not required by this legislation. Filmmakers are, however, encouraged to produce and distribute open-captioned versions of films, and theaters are encouraged to have at least some pre-announced screenings of a captioned version of feature films." H.R. Rep. No. 101-485, pt. 2, at 108 (1990); S. Rep. No. 101-116, at 64 (1989).

is an undue burden for a theater to exhibit movies with closed movie captioning in an auditorium.”³⁵

The Department is aware, both from comments received from the industry and from some individuals, that open captions may reduce the amount of enjoyment experienced by people who do not need captioning. For those movie theaters that elect to meet these requirements through the exhibition of movies with open captioning, in whole or in part, the movie theaters may elect to turn on the open captions only after a timely request has been made for captions. For this approach to be effective, movie theaters should clearly and conspicuously advertise at the ticket offices and at the doors to each auditorium the process, procedures, and time periods for making captioning requests.

Question 9: Do the alternative provisions regarding when and how to employ open movie captions strike an appropriate balance? Should the Department define what a timely request is in this context? Has the Department adequately addressed the possibility that new technology may develop that can be used to provide effective communication at movie theaters?

Individual Captioning Devices

A commenter from a disability advocacy organization encouraged the Department to specify the number of individual captioning devices that must be made available at each movie theater, pointing out that groups of persons who are deaf or hard of hearing should be able to attend movies at the same time and have sufficient individual captioning devices available to enable them to enjoy the movie at the time of their choice. A commenter from the movie theater

³⁵ With open movie captioning, there is no need for additional equipment to display the captions and, therefore, there is no additional cost to the theaters. For digital cinema, the movie theater simply selects the open caption option from its digital menu and the open captions appear on the movie screen for that showing only. For analog films, the movie theater would order the version with open movie captions, if available, and just display the movie without need for any additional equipment.

industry recommended that the Department require only one individual captioning device per movie screen equipped to display digital cinema. The Department already has a requirement for a specific number of assistive listening receivers that must be made available at each movie theater for persons who need amplification of sound during a movie. *See* table 219.3 in the 2010 ADA Standards for Accessible Design (2010 Standards).³⁶ Adding a requirement for a particular number of individual captioning devices would be consistent with that approach and is necessary to ensure that patrons who are deaf and hard of hearing are provided with effective communication.

In the NPRM, the Department is proposing scoping for the required number of individual captioning devices in numbers that approximate about half the number of assistive listening receivers already required for assembly areas by the 2010 Standards. Proposed § 36.303(g)(2)(iii)(A) states, “[a] public accommodation that owns, leases, or leases to, or operates a movie theater shall provide individual captioning devices in accordance with the following Table. This requirement does not apply to movie theaters that elect to exhibit all movies at all times at that facility with open movie captioning.”

³⁶ 28 CFR § 36.104 (title III) (defining the “2010 Standards” as the requirements set forth in appendices B and D to 36 CFR part 1191 and the requirements contained in subpart D of 28 CFR part 36). The 2010 Standards can be found at http://www.ada.gov/2010ADASTandards_index.htm (last visited July 14, 2014).

Capacity of Seating in Movie Theater	Minimum Required Number of Individual Captioning Devices
100 or less	2
101 to 200	2 plus 1 per 50 seats over 100 seats or a fraction thereof
201 to 500	4 plus 1 per 50 seats over 200 seats or a fraction thereof
501 to 1000	10 plus 1 per 75 seats over 500 seats or a fraction thereof
1001 to 2000	18 plus 1 per 100 seats over 1000 seats or a fraction thereof
2001 and over	28 plus 1 per 200 seats over 2000 seats or a fraction thereof

This table's proposed requirements are based on the total number of seats for all screens in the movie theater. If a movie theater has more than one screen, the number of seats are combined together to determine the required number of individual captioning devices.

The Department believes that its proposed numbers are sufficient because not every individual with hearing loss requires the use of captioning in order to enjoy movies. There are many individuals with mild to moderate hearing loss who can use the amplification provided by assistive listening receivers, although there are some individuals with moderate hearing loss for whom the assistive listening receivers are not effective. *See discussion supra.* The Department does not agree with the movie theater industry's recommendation that it should require each movie theater to have only one individual captioning device available for each auditorium that has captioning equipment installed because it does not believe that this would be a sufficient number given the number of persons with moderate and severe hearing loss or who are

profoundly deaf who would benefit from closed captioning. Moreover, the Department believes that it is more appropriate to base the scoping for individual captioning devices on the number of seats at the movie theater, rather than the number of movie screens, because the number of devices should be proportionate to the number of individuals who can attend the movie. Under the Department's formula, a movie theater that had five screens in auditoriums that could accommodate a total of 3000 people would need to have more devices available than a movie theater that also had five screens but in auditoriums that could only accommodate a total of 1000 people. This approach is consistent with the way assistive listening receivers are scoped in the current regulation.

Industry commenters asserted that even in those auditoriums that have installed Rear Window[®] Captioning systems, industry data indicates that there are few requests to use them. Based on the comments received in response to its 2010 ANPRM and its independent research, the Department has concluded that the availability of captioning in the United States is limited, and it is therefore not appropriate to base conclusions about potential use of individual captioning devices on current usage data at those few auditoriums that offer closed captioning on a limited basis.³⁷ The Department believes that the demand for individual captioning devices will be much greater than one device per auditorium once movies are regularly and uniformly exhibited with captioning and the availability of captioning becomes widely known. This is especially true given the anticipated increase in the number of deaf and hard of hearing individuals in the United States that will come with the aging of the U.S. population.

³⁷ When the Department adopted standards for physical accessibility in public accommodations, the Department similarly did not base its scoping on how many persons with disabilities accessed inaccessible facilities.

The Department received numerous comments from advocacy organizations and deaf and hard of hearing individuals indicating that they were unable to attend the few movies currently offered with closed captioning because they were not publicized, were usually scheduled a few times a week at off hours (often in the middle of the weekday), or were only scheduled for one movie at a time, despite the variety of movies that are shown at any one time at a movie theater. These commenters stated that if captioned movies were available to them for all movies at all times, they would then become regular moviegoers in the same manner as persons who are not deaf or hard of hearing. These commenters included deaf and hard of hearing parents of children who wished to attend movies, teenagers who wished to attend movies with their friends on the weekends at peak times, and people who work during the day who wished to attend movies during evening hours and on weekends. Many of the deaf and hard of hearing individuals who testified at the Department's three public hearings or who submitted comments stressed that they have not been to a movie for many years either because of the lack of availability of captioning or because when they tried to see films advertised as having captioning they arrived at the movie theater only to find that the staff did not know where the individual captioning devices were or how to turn on the captioning, or the individual devices themselves malfunctioned.

Question 10: The Department seeks public comment on its proposed scoping for individual captioning devices. If the scoping is not correct, what are the minimum number of individual captioning devices that should be available at a movie theater? Please provide the basis for alternative suggestions. If the required number of individual captioning devices is linked to the number of seats in the movie theater facility, should the percentage decrease for very large facilities with multiple screens? What should the threshold(s) be for this calculation? Should the Department consider different scoping approaches for small theaters? How so and why?

Are there alternative scoping approaches that the Department should consider to address variability in demand for the devices across theaters? If so, please describe such alternatives in as much detail as possible.

Standards for Individual Captioning Devices

The Department received a number of comments for specific performance standards for individual captioning devices. These commenters wanted the Department to ensure that the text that is exhibited on these devices is readable with good contrast and good text size, that it be available at a reasonable height in relation to the movie screen, that the devices be easily used by patrons who are deaf or hard of hearing, and that they be properly maintained. The Department has considered these comments and is proposing in the NPRM, at §36.303(g)(2)(ii)(B), that “[i]n order to provide effective communication, individual captioning devices must: (1) be adjustable so that the captions can be viewed as if they are on or near the movie screen; (2) be available to patrons in a timely manner; (3) provide clear, sharp images in order to ensure readability; and (4) be properly maintained and be easily usable by the patron.”

The Department received a number of comments expressing concern that seat location can have an impact on the ability to read closed captions. Those commenters recommended that the Department require movie theaters to reserve seats in the center of the auditorium to persons using individual captioning devices. In contrast, an industry commenter stated that the ability to read the captions provided by the new closed-caption systems for digital cinema has been reported to be equally good throughout the movie theater auditorium and that the system currently in use for analog has reportedly been improved for use with digital cinema.

The Department has decided not to propose any kind of reserved seating provision in the regulation at this point because it believes that its proposed performance standards will ensure

the usability of individual captioning devices. In addition, seating at movie theaters generally is on a first-come, first-served basis, and patrons know to come early if they want to sit in the “sweet spot” or other desirable seats in the auditorium.³⁸ While movie theaters may select whatever captioning equipment they want to deliver closed captions to their patrons, they must provide effective communication to individuals with disabilities who are deaf, hard of hearing, blind, or have low vision. The proposed performance standards should assist movie theaters in meeting that requirement.

Question 11: Has the Department adequately described performance standards for individual captioning devices that deliver closed captions to patrons? How should the standards address text size that is displayed on the devices?

Audio Description

Coverage. In § 36.303(g)(3)(ii) of the NPRM, the Department is proposing that a public accommodation that owns, leases, leases to, or operates a movie theater shall ensure that its auditoriums have the capability to exhibit movies with audio description and in all cases where the movies it intends to exhibit are produced, distributed, or otherwise made available with audio description, the public accommodation shall ensure that it exhibits such movies with audio description at all scheduled screenings of those movies. This requirement is comparable to the requirement for exhibition of movies with closed captioning at proposed § 36.303(g)(2). In addition, with respect to digital screens, the Department is proposing the same six-month compliance date for the provision of audio description at § 36.303(g)(3)(i) as it is for movie captioning. With respect to analog screens, the Department is seeking public comment on

³⁸ If a movie theater adopts an all-reserved seating policy, it would be advisable to hold back certain seats for individuals who need captioning (or audio description) if the captioning (or audio description) does not work well throughout the auditorium or works better in specific areas of the auditorium.

whether to adopt a four-year delayed compliance date for the provision of audio description or defer new requirements for analog screens to provide audio description for now and consider additional rulemaking at a later date.

The Department received virtually no comments objecting to a requirement for the exhibition of movies with audio description when such movies are available to movie theaters with audio description. The overwhelming number of commenters addressing audio description indicated that they believed it should be available at all movies at all times. However, while industry commenters agreed that audio description should be available, they suggested limiting any requirement for exhibiting movies with audio description to 25 percent of those auditoriums that have converted to digital cinema. A 25 percent requirement would significantly limit the availability of movies with audio description across the country.

As discussed with respect to proposed § 36.303(g)(2) (movie captioning), the Department believes that given the availability of audio-description technology, and in light of the purpose and goals of the ADA and its statutory and regulatory framework, the ADA requires nothing less than full access to audio-described movies at all times such movies are exhibited, whenever such movies are produced, distributed, or otherwise made available to movie theaters. The primary goals of the ADA are to assure equality of opportunity and full access and participation in our society for individuals with disabilities. 42 U.S.C. 12101. The ADA requires public accommodations to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently because of the absence of auxiliary aids and services unless the public accommodation can demonstrate that taking such steps would result in a fundamental alteration or undue burden. 42 U.S.C. 12182(b)(2)(A)(iii).

Individual audio-description listening devices. In order to ensure that individuals who are blind or have low vision have access to audio-described movies when such movies are available in a movie theater, the theater needs to provide a reasonable number of audio-description listening devices for individual use. The comments received and the Department's research indicate that many of the assistive listening receivers currently in use in the United States have two channels, one of which is needed for amplified sound, and the other that could be used for audio description. The NPRM proposes at § 36.303(g)(3)(ii)(B) that a theater may meet its obligation to provide individual captioning devices if the receivers it uses to meet its obligations to provide assistive listening systems in accordance with the requirements in table 219.3 of the 2010 Standards have at least two channels, one of which can be available for transmission of audio description. For those theaters that do not have two-channel assistive listening receivers, the Department is proposing in § 36.303(g)(3)(ii)(A) to require minimal scoping of one individual audio-description listening device per auditorium, with a minimum of two devices per theater. This proposal is relatively consistent with the recommendations of at least one industry commenter on the 2010 ANPRM, who asserted that the Department should limit any requirement for individual audio-description listening devices to one receiver per auditorium. In any event, the Department believes that because many movie theaters already have two channel assistive listening receivers that they use to meet their existing requirements under the 2010 Standards, the proposed scoping will not require many movie theaters to buy additional equipment.

The Department received comments and heard testimony from individuals and organizations representing individuals who are blind and have low vision stating that they do not attend movies because of the lack of audio description, but would begin going to movies once audio description is readily available.

Question 12: How many devices capable of transmitting audio description to individuals should each movie theater have on hand for use by patrons who are blind or have low vision? Should the number of individual audio-description listening devices be tied to the number of seats in each auditorium or other location with a movie screen? Should the number of individual audio-description listening devices be tied to the number of seats in the theater facility as a whole? Please provide the basis for your comment. How many movie theaters have two-channel receivers that can be used to provide audio description? How many movie theaters will need to buy additional individual audio description listening devices? How much do audio description listening devices that meet the requirements of this proposed rule cost?

For some small movie theaters, it may be an undue burden to purchase the equipment needed to exhibit movies with closed captioning and audio description and meet the other requirements of the rule. Determining whether compliance with the requirements of this rule will result in an undue burden, however, requires the individualized, fact-specific inquiry and analysis discussed previously. In some circumstances, movie theaters may incur a cost to determine whether and to what extent compliance with the rule would result in an undue burden. Such costs may include the time to determine how to comply with the rule's requirements; the time to gather, compile, and review financial records; and the time to obtain estimates of the cost of compliance. The Department lacks information necessary for estimating the time and other costs a theater would incur to determine whether compliance would result in an undue burden and the extent to which this rule would increase movie theaters' legitimate use of the undue burden analysis compared to the status quo. This information, however, would be important for analyzing at the final rule stage the incremental effect of the rule and for analyzing regulatory alternatives, particularly for small theaters.

The Department notes that many small businesses will be able to defray the costs of compliance with this rule if they qualify for a special IRS tax credit that is intended to defray the costs of providing access to persons with disabilities in accordance with the requirements of the ADA. Section 44 of the Internal Revenue Code of 1986 allows eligible businesses a tax credit of 50 percent of the cost of “eligible access expenditures,” defined as amounts paid or incurred “(A) for the purpose of removing architectural, communication, physical, or transportation barriers which prevent a business from being accessible to, or usable by, individuals with disabilities, * * * (D) to acquire or modify equipment or devices for individuals with disabilities, or (E) to provide other similar services, modifications, materials, or equipment.” 26 U.S.C. 44(c)(2). This tax credit is available to businesses with gross receipts of less than one million dollars each year or that have 30 or fewer full-time employees. *See* 26 U.S.C. 44(b). The Department believes that providing captioning and audio description to meet the longstanding obligation to provide effective communication under the ADA falls within this tax code provision.

Question 13: The Department invites comments on the additional time it will take and other possible costs movie theaters would incur to determine whether compliance with the rule would constitute an undue burden. What kinds of costs are involved? How much time would a theater spend determining how to comply with the rule; gathering, compiling, and reviewing financial records; and estimating the cost of compliance? Would small theaters have professionals such as accountants or lawyers review their financial records? What information should the Department use to estimate the per hour cost of the time movie theaters spend undertaking these activities? How might the Department develop an estimate of the average time and cost required to determine whether full compliance would constitute an undue burden? To what extent would

this rule increase movie theaters' reliance on the undue burden analysis compared to the status quo? What characteristics of small theaters would make it more likely that it would be an undue burden to comply with the rule? Are there empirical studies or other credible information available for estimating the time and cost for a theater to make a legitimate determination that compliance would constitute an undue burden? The Department is interested in comments in response to these questions from the public in general, but particularly from small movie theater owners and operators and from other small businesses covered by title III of the ADA with experience in determining whether it is an undue burden to meet their effective communication obligation.

Notice Requirement

The Department believes that it is essential that movie theaters provide adequate notice to patrons of the availability of captioned and audio-described movies. In the 2010 ANPRM, in Question 18, the Department requested public comment relating to the necessity of a requirement for providing notice about the availability of captioned and audio-described movies and the scope of such a requirement. The Department received numerous comments in response to this question. The vast majority of commenters supported a notice requirement that included provisions for notice in the range of communications and media utilized by movie theaters to advertise their films. Several commenters recommended that the Department require a uniform system of labeling movies as having open captioning (OC), closed captioning (CC), or audio description (AD). Other commenters stated that they believed the form of notice should be left to the discretion of movie theaters. Many commenters encouraged the Department to ensure that movie listings provided over the phone include this information, so that patrons who are blind and have low vision and who do not utilize Web-based or print media can find out which movies

carry audio description. Industry commenters noted that while the industry agrees that providing notice of captioning and audio description is important, movie theaters do not have control over the information provided on third-party Web sites that provide show time information and that sell tickets. These same commenters indicated that they have been working with these Web sites to voluntarily provide accurate information about current screenings of captioned and audio-described movies. Many commenters noted that if the Department adopted a requirement that all movies be shown with captioning and audio description, the need for notice would disappear, since patrons could assume that all movies would be accessible to them.

After considering these comments, the Department has decided to propose a requirement for provision of notice to patrons that covers all types of communications and advertisements provided by movie theaters, but does not require a specific form of notification. Proposed §36.303(g)(5) states the following: “movie theaters shall ensure that communications and advertisements intended to inform potential patrons of movie showings and times, that are provided by the theaters through websites, posters, marquees, newspapers, telephone, and other forms of communication, shall provide information regarding the availability of captioning and audio description for each movie.” Even though the Department has proposed a 100 percent requirement, it will still be necessary to provide notice regarding which movies have captions and audio description because not all movies will be available to movie theaters with captions or audio description. The Department notes that third parties are not liable under the ADA when they publish information about movies if they fail to include information about the availability of captioning and audio description at movie theaters.

Question 14: It is the Department’s view that the cost of the proposed requirement for theaters to provide notice indicating which screenings will be captioned or audio-described is de

minimus. The Department requests comments on this view. Specifically, how much will it cost theaters to provide information regarding the availability of captioning and audio description for each movie and to specify whether open movie captions or closed movie captions will be provided for each particular showing and time? The Department understands that this cost may vary depending on the type of communication or advertisement, and so we request that commenters specify the type of communication or advertisement along with their cost estimate. In addition, how many times in a given year do theaters provide communications and advertisements that would trigger this proposed requirement? The Department understands that this will likely vary depending on how many screens a theater has, and so we request theater commenters to specify how many screens they operate in their response to this question. Because the rule would require 100 percent of movies available with captions and audio description to be shown with these accessibility features, should the Department permit theaters to indicate those movies that do not have these features rather than indicating those that have these features? Would this approach have an effect on the cost of providing notice? If so, how would it affect the cost?

Capability to Operate Captioning and Audio Description Equipment

The Department received a significant number of comments from individuals with disabilities and groups representing persons who are deaf or hard of hearing and who are blind or have low vision strongly encouraging the Department to include a requirement that staff at movie theaters know how to operate captioning and audio description equipment and be able to communicate about the use of individual devices with patrons. These commenters stated that on numerous occasions when they attempted to go to a movie advertised as having captioning or audio description, there was no staff available who knew where the individual captioning devices

were kept or how to turn on the captioning or audio description for the movie. Many of these individuals indicated they were unable to experience the movie fully because of the lack of trained personnel, even if the auditorium was properly equipped and the movie was actually available with captioning or audio description. Industry commenters agreed that staff should be knowledgeable in the use of equipment but asserted that training in the use of all equipment in a movie theater was standard practice, and therefore, such a requirement was not necessary.

Having considered these comments, the Department has decided to include in the NPRM proposed § 36.303(g)(6), which states, “movie theaters must ensure that there be at least one individual on location at each facility available to assist patrons seeking these services at all times when a captioned or audio-described movie is shown. Such assistance includes the ability to:

- (i) Operate all captioning and audio-description equipment;
- (ii) Locate all necessary equipment that is stored and quickly activate the equipment and any other ancillary equipment or systems required for the use of the devices; and
- (iii) Communicate effectively with individuals who are deaf or hard of hearing and blind or have low vision regarding the uses of, and potential problems with, the equipment for such captioning or audio description.”

The Department believes that the requirement in § 36.303(g)(6)(iii) is necessary to ensure effective communication for persons who are deaf or hard of hearing and blind or have low vision so that they can have equal access to movie theaters. The Department notes, however, that providing effective communication about the availability of captioning would not require that the theater hire a sign language interpreter. Communication with a person who is deaf or hard of hearing about the availability of captioning or how to use the equipment involves a short

and relatively simple conversation, and therefore, can easily be provided through signage, instruction guides, and exchange of written notes.

Question 15: How much additional time beyond the normal time movie theaters spend training staff would be needed to incorporate instruction in the operation and maintenance of the equipment for captioning or audio description? How much additional time do theaters anticipate spending on assisting patrons in using the captioning and audio description devices? How should the Department estimate the value of the additional time theater personnel would spend on assisting patrons in using the captioning and audio description devices? Would that additional cost be borne by the theaters, and if so, how?

V. Other Issues

Several commenters asked the Department to include a requirement that movie theaters maintain all equipment needed to provide captioning and audio description. The Department notes that § 36.211 of the title III regulation already requires that public accommodations “maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part.” The Department does not believe a separate requirement is necessary for equipment needed to provide captioning and audio description.

VI. Regulatory Process Matters

A. Executive Orders 13563 and 12866—Summary of Initial Regulatory Assessment

1. Background

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety

effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

In keeping with Executive Order 12866 the Department has evaluated this proposed rule to assess whether it would likely “[h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.” E.O. 12866, § 3(f)(1). The Department’s Initial RA shows that this proposed regulation does not represent an economically “significant” regulatory action within the meaning of Executive Order 12866. *See* E.O. 12866, §§ 3(f)(1), 6(a)(3)(C). The Department’s full Initial RA can be found in the docket for this proposed rule at <http://www.Regulations.gov>.

2. Costs—Summary of Likely Economic Impact

The Initial RA provides estimates of the total cost of the rule under Option 1 (a six-month compliance date for digital screens and a four-year compliance date for analog screens) and Option 2 (a six-month compliance date for digital screens and a deferral of new regulatory requirements on analog screens) over a 15-year time horizon. For Option 1, we estimate that the cost of the rule will range from \$177.8 million to \$225.9 million when using a 7 percent discount rate, and from \$219.0 million to \$275.7 million when using a 3 percent discount rate. For Option 2, we estimate that the cost of the rule will range from \$138.1 million to \$186.2 million when using a 7 percent discount rate, and from \$169.3 million to \$226.0 million when using a 3 percent discount rate.

The range of cost estimates for both options depends on the assumptions used regarding the extent to which theaters are or soon will be providing closed movie captioning and audio

description as proposed in this rule, but independently of this rulemaking. This Initial RA estimates costs using three different baselines due to a lack of information regarding the extent to which theaters are already providing captioning and audio description as proposed in this rule. Under Option 1, each baseline assumes that 2 percent of analog theaters currently meet the requirements of this proposed rule. Under Option 2, the baselines do not make assumptions about analog screens because the rule would defer requirements on such screens to future rulemaking. See Initial RA section 4 for details.

- *Baseline 1 (One Screen Per-Theater)*—This baseline assumes that on average, every movie theater with digital screens has one screen that is captioning enabled³⁹ (based on an assumption of at least some compliance with the existing ADA requirements that public accommodations provide effective communication to persons with hearing and vision disabilities). This assumption leads to an estimate of about 13 percent of all digital screens having captioning capabilities. For Option 1, this baseline also assumes that 2 percent of analog screens are captioning enabled.
- *Baseline 2 (Litigation-Based)*—This baseline is derived using available data regarding movie theater companies that are now providing captioning and that have been involved in recent litigation challenging their failure to comply with existing ADA effective communication requirements. This baseline assumes that 42 percent

³⁹ The three baselines described in this section use the term “captioning enabled.” This term refers to the extent to which movie theaters and movie screens currently have the hardware and captioning devices needed to comply with this NPRM. Each baseline includes assumptions for what this term means, and those assumptions can be found in the initial regulatory impact analysis that accompanies this NPRM.

of digital screens are captioning enabled. For Option 1, this baseline also assumes that 2 percent of analog screens are captioning enabled.

- *Baseline 3 (2013 NATO Survey-Based)*—This baseline uses data provided in testimony by officials from the NATO before Congress in May 2013, in which 53 percent of digital screens were described as already captioning enabled. For Option 1, this baseline also assumes that 2 percent of analog screens are captioning enabled.

Costs are estimated over a 15-year period, beginning with the year in which the rule becomes effective (assumed to be 2015). For both options, costs are estimated for theaters with digital screens beginning in the first year after publication of the final rule (2015). For Option 1, costs are estimated for theaters with analog screens beginning in the fourth year after publication of the final rule (2018).

The estimated costs primarily consist of the following: (1) the purchase of hardware and software to send the captions to users' individual devices; (2) the purchase of individual devices as per the scoping requirements specified in the rule; (3) periodic costs to replace hardware, software, and devices; (4) annual operations and maintenance costs to cover storage, management, staff training, and other recurring costs; (5) any additional hardware costs to transmit audio description to individual devices; and (6) any additional costs associated with the purchase of additional of individual audio-description listening devices. The costs do not include the costs to theaters to convert their screens from analog to digital, because this rule does not require any movie theater to convert to digital cinema, and doing so is not necessary to comply with the proposed requirements.

Estimated Costs Under Option 1 (2015 Dollars, 15-year Time Horizon)

Discount Rate	Under Baseline 1 Assumptions – One Screen Per-Theater (millions \$)	Under Baseline 2 Assumptions – Litigation-Based (millions \$)	Under Baseline 3 Assumptions – NATO Survey Based (millions \$)
7%	\$225.9	\$191.9	\$177.8
3%	\$275.7	\$235.6	\$219.0

Estimated Costs Under Option 2 (2015 Dollars, 15-year Time Horizon)

Discount Rate	Under Baseline 1 Assumptions – One Screen Per-Theater (millions \$)	Under Baseline 2 Assumptions – Litigation-Based (millions \$)	Under Baseline 3 Assumptions – NATO Survey Based (millions \$)
7%	\$186.2	\$152.2	\$138.1
3%	\$226.0	\$186.0	\$169.3

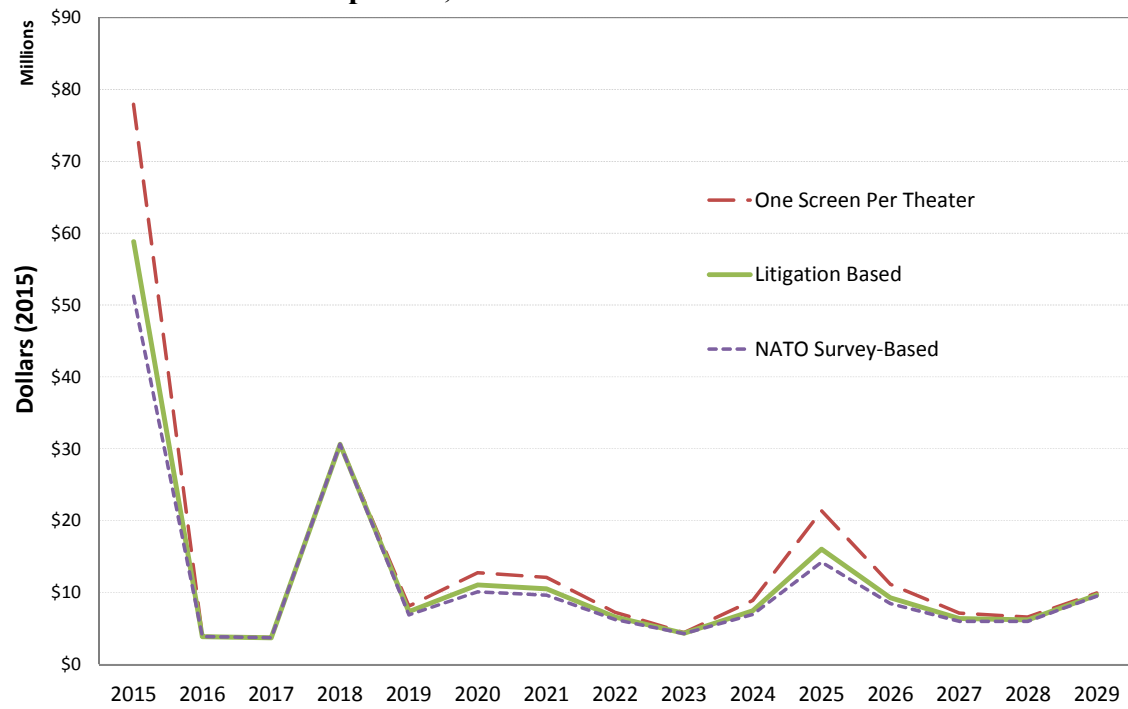
Under Option 1, the estimated annualized costs of the proposed regulation under each of the three baseline scenarios range from \$19.5 million to \$24.8 million when using a 7 percent discount rate, and from \$18.3 million to \$23.1 million when using a 3 percent discount rate.

Under Option 2, the estimated annualized costs of the proposed regulation under each of the three baseline scenarios range from \$15.2 million to \$20.4 million when using a 7 percent discount rate, and from \$14.2 million to \$18.9 million when using a 3 percent discount rate.⁴⁰

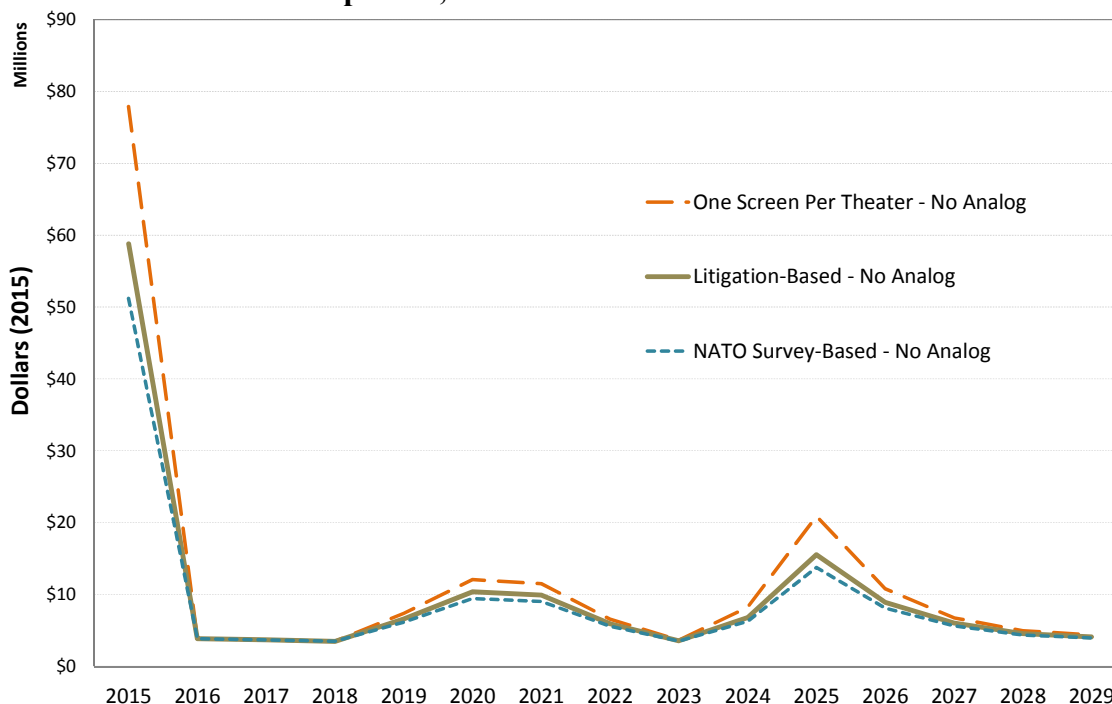
The Initial RA shows that estimated annual costs for this proposed rule will not exceed \$100 million in any year under any of three baseline scenarios, irrespective of which option the Department selects for analog screens. Annual costs for each year during the 15-year expected term of the proposed regulation are depicted in the following figures:

⁴⁰ Annualized costs were calculated in a Microsoft Excel model using the PMT function ($-PMT(\text{discount rate}, \text{years of analysis}, \text{present value of total costs})$).

Annual Costs of Rule Under Option 1, Discounted at 7 Percent



Annual Costs of Rule Under Option 2, Discounted at 7 Percent



Because movie theater complexes vary greatly by number of screens, which significantly impacts overall costs per facility, the analysis breaks the movie exhibition industry into four theater types based on size—Megaplexes (16 or more screens), Multiplexes (8-15 screens), Miniplexes (2–7 screens), and Single Screen Theaters—and by digital or analog system. Per-facility costs were then calculated for each theater type. The largest costs per year for any single movie theater would occur in the first year due to the purchase of necessary equipment. The first year’s costs for digital Megaplex theaters are estimated to total \$38,547, while comparable costs for digital single screen theaters would total \$3,198.⁴¹

⁴¹ Unless a dollar figure in the text or the tables specifically identifies a particular baseline, the default baseline for general dollar figures uses Baseline 1.

**Per Digital Theater Initial Capital Costs for Captioning and Audio Description Equipment
(hardware, software and devices), 2015 Dollars***

Digital Theater Type/Size	Per-Theater Initial Capital Costs (Using Doremi Technology for Movies in Digital Format)	Per-Theater Initial Capital Costs (Using USL Technology for Movies in Digital Format)	Average Initial Capital Costs for Digital Theater (Average of Different Technology)
Megaplex	\$40,540	\$36,554	\$38,547
Multiplex	\$27,880	\$25,798	\$26,839
Miniplex	\$10,920	\$10,252	\$10,586
Single Screen	\$3,285	\$3,111	\$3,198

Note: These initial capital costs include the costs to purchase and install: (1) captioning hardware and software (one per screen); (2) individual devices for captioning (ranging from 4 for Single Screens to 34 for Megaplexes); (3) additional hardware, if needed, to transmit audio description (from none to one device per screen); and (4) additional devices for audio description (ranging from 2 for Single Screens to 18 for Megaplexes).

* Because unit costs for captioning and audio description equipment have either remained steady or declined between 2010 and 2013, they are assumed to remain constant from 2013 (when last researched) to 2015, when the final rule is expected to be published.

Should the Department proceed under Option 1 and cover analog screens, per theater costs for analog theaters would be higher than those for digital theaters for each type/size.⁴² The first year per-theater costs for analog single screen theaters, which are measured in year four, would total \$8,172. The first year costs for digital single screen theaters, which are measured in year one, would average \$3,198.

⁴² The Department's analysis assumes that at the time this rule takes effect, theaters will either be exclusively digital or exclusively analog (that is, all of the screens in a theater will be either digital or analog).

Per Analog Theater Initial Capital Costs of Captioning and Audio Description Equipment (hardware, software and devices), 2015 Dollars*

Analog Theater Type/Size	Per Theater Initial Capital Costs (Rear Window Technology for Analog Films)
Megaplex**	<i>NA</i>
Multiplex**	<i>NA</i>
Miniplex	\$31,884
Single Screen	\$8,172

Note: These first year costs include (1) the costs to purchase and install: captioning hardware and software (one per screen); (2) individual devices for captioning (ranging from 4 for Single Screens to 34 for Megaplexes); (3) additional hardware, if needed, to transmit audio description (from none to one device per screen); and (4) additional individual audio description listening devices (ranging from 2 for Single Screens to 18 for Megaplexes).

* Since unit costs for captioning and audio description equipment have either remained steady or declined between 2010 and 2013, they are assumed to remain constant from 2013 (when last researched) to 2015, when the final rule is expected to be published.

** Note that the Initial RA assumes that all Megaplexes and Multiplexes have transitioned to digital projection systems by the time this rule goes into effect.

In addition, the Initial RA uses a value equivalent to 3 percent of all the captioning and audio-descriptive equipment owned by the theater to capture any operations and maintenance costs including the incremental increase to staff time, the costs of adding information that captioning or audio description is available when preparing communications regarding movie offerings, and other potential increases in administrative costs. These costs are annual. This 3 percent is a factor commonly used in construction and equipment maintenance. *See* Regulatory Impact Analysis for the Final Revised Regulations Implementing Titles II and III of the ADA, app. 3.I (Sept. 15, 2010), available at

http://www.ada.gov/regs2010/RIA_2010regs/ria_appendix03.htm#ai (last visited July 14, 2014).

In dollar terms, operations, maintenance, and training costs for analog theaters are estimated on an annual basis to average from a low of \$245 for Single Screens to a high of \$957 for

Miniplexes; for digital theaters' operations, maintenance and training costs are estimated to average from a low of \$96 for Single Screens to a high of \$1,156 for Megaplexes.

Question 16: The Department invites comment on the Initial RA's methodology, cost assumptions, and cost estimates, including the specific costs of purchasing, installing and replacing captioning and audio description equipment, and the costs of complying with the training and notice requirements of the rule. The Department is particularly interested in receiving comments about the frequency with which captioning and audio description devices need to be replaced. The Department is also interested in estimates of how much time it would take for theaters to acquire the equipment needed to comply with this rule.

3. Benefits—Qualitative Discussion of Benefits

The benefits of this rule are difficult to quantify for multiple reasons. The Department has not been able to locate robust data on the rate at which persons with disabilities currently go to movies shown in movie theaters. In addition, as a result of this rule, the following number of persons will change by an unknown amount: (1) the number of persons with disabilities who will newly go to movies, (2) the number of persons with disabilities who will go to movies more often, (3) the number of persons who will go to the movies as part of a larger group that includes a person with a disability, and (4) the number of persons with disabilities who would have gone to the movies anyway but under the rule will have a fuller and more pleasant experience. In addition, the Department does not know precisely how many movie theaters currently screen movies with closed captioning and audio description, or how many people with hearing or vision disabilities currently have consistent access to movie theaters that provide closed captioning and audio description. Finally, the Department is not aware of any peer reviewed academic or

professional studies that monetize or quantify the societal benefit of providing closed captioning and audio description at movie theaters

The individuals who will directly benefit from this rule are those persons with hearing or vision disabilities who, as a result of this rule, would be able for the first time to attend movies with closed captioning or audio description in theaters across the country on a consistent basis. Individuals who will indirectly benefit from this rule are the family and friends of persons with hearing and vision disabilities who would be able to share the movie-going experience more fully with their friends or loved ones with hearing and vision disabilities.

Data on movie-going patterns of persons who are deaf or hard of hearing or are blind or have low vision is very limited, making estimations of demand very difficult. However, numerous public comments suggest that many persons who are deaf or hard of hearing or are blind or have low vision do not go to the movies at all, or attend movies well below the national average of 4.1 annual admissions per person, because of the lack of auxiliary aids and services that would allow them to understand and enjoy the movie.

Though we cannot confidently estimate the likely number of people who would directly benefit from this proposed rule, we have reviewed data on the number of people in the United States with hearing and vision disabilities. The Census Bureau estimates that 3.3 percent of the U.S. population has difficulty seeing, which translates into a little more than eight million individuals in 2010, and a little more than two million of those had “severe” difficulty seeing.⁴³

⁴³ The Census defines “[d]ifficulty seeing” as “experiencing blindness or having difficulty seeing words and letters in ordinary newsprint, even when wearing glasses or contact lenses (if normally worn).” U.S. Census Bureau, U.S. Department of Commerce, P70-131, *Americans with Disabilities: 2010 Household Economic Studies* at 8 (2012), available at <http://www.census.gov/prod/2012pubs/p70-131.pdf> (last visited July 14, 2014). It defines “[d]ifficulty hearing” as “experiencing deafness or having difficulty hearing a normal conversation, even when wearing a hearing aid.” *Id.*

At the same time, the Census Bureau estimates that 3.1 percent of people had difficulty hearing, which was a little more than 7.5 million individuals in 2010, and approximately one million of them had “severe” difficulty hearing. Not all of these people would benefit from this proposed rule. For example, some people’s hearing or vision disability may not be such that they would need closed captioning or audio description. Some people with hearing or vision disabilities may not use the equipment for a variety of reasons, including finding the equipment uncomfortable to use. Some people with hearing or vision disabilities may already have consistent access to theaters that screen all their movies with closed captioning and audio description. And some theaters may not provide closed captioning and audio description for all their movies because it would be an undue burden under the ADA to do so. Meanwhile, some people with hearing or vision disabilities would not attend public screenings of movies even if theaters provided closed captioning and audio description simple because they do not enjoy going out to the movies—just as is the case among persons without disabilities.⁴⁴

In recent years, a large number of movie theaters have already invested in equipment to provide closed captioning and audio description. As noted earlier in this NPRM, NATO estimates that 53 percent of digital screens are already captioning and audio description enabled. However, this does not translate into an estimate that about half (or 53 percent) of persons who are deaf or hard of hearing or are blind or have low vision are now benefiting from captioning or audio description. There are multiple reasons why, even if we accept this estimate of the current availability of captioning and audio description, that it does not translate into direct benefits for

⁴⁴ In 2012, a little more than two thirds (68 percent) of the U.S. and Canadian population over two years old went to a movie at a movie theater at least once that year. See Motion Picture Association of America, *Theatrical Market Statistics* at 11 (2012), available at <http://www.mpa.org/wp-content/uploads/2014/03/2012-Theatrical-Market-Statistics-Report.pdf> (last visited July 14, 2014).

all those who could benefit. Such reasons include the following: (1) only some screens at some theaters may have closed captioning and audio description capabilities and those may not be showing the movie the person wants to see, (2) the theater may not be showing the desired movie with closed captions and audio description on a convenient day or at a convenient time, (3) the theater may be located much farther away from where the person with a disability resides than other, less accessible theaters, which may result in a decision not to go to a movie theater at all, or (4) a person may live in a community that has theaters with closed captioning and audio description capability but may travel (for vacation, to visit relatives, for work, or other reasons) to a community that does not have theaters that are captioning and audio description enabled.

Not only is the estimate of the number of who might directly benefit from the proposed rule uncertain, but the individual benefits are not uniform because persons who are deaf or hard of hearing or are blind or have low vision are likely to benefit from this proposed rule in different ways and realize benefits in different amounts. The type and amount of benefits can depend on personal circumstances and preferences, as well as proximity to movie theaters that otherwise would not offer captioning or audio description but for this proposed rule. Some persons with vision and hearing disabilities have effectively been precluded from going to movies at theaters because the only theaters available to them did not offer closed captioning or audio description, offered open captioning but only at inconvenient times (such as the middle of the day during the week), or offered captioning or audio description for only a few films and not for every screening of those films. For these persons, the primary benefit will be the ability to see movies when released in movie theaters along with other movie patrons that they otherwise would not have had the opportunity to do. They will have the value of that movie-going experience, as well as the opportunity to discuss the film socially at the same time as the rest of the movie-viewing public.

The amount of benefit experienced by a person with a vision or hearing disability who previously had no access to a theater that provided closed captioning or audio description at all its screenings will be different than the amount experienced by a person with a hearing or vision disability who previously had access to a theater that did consistently provide closed captioning and audio description at its screenings. In addition, the amount of benefit from this rule experienced by a person who cannot follow a movie at all without the assistance of closed captioning is likely to be greater than the amount of benefit experienced by a person who can follow parts of a movie without the assistance of closed captioning.

In addition to the direct beneficiaries of the proposed rule discussed above, others may be indirect beneficiaries of this rule. Family and friends of persons with these disabilities who wish to go to the movies all together as a shared social experience will now have greater opportunities to do so. More adults who visit elderly parents with hearing or sight limitations would presumably be able to take their parents on outings and enjoy a movie at a theater together, sharing the experience as they may have in the past.

The Department received numerous comments from individuals who are deaf or hard of hearing or blind or have low vision in response to its 2010 Advance Notice of Proposed Rulemaking on Movie Captioning and Video Description in Movie Theaters describing how they were unable to take part in the movie-going experience with their friends and family because of the unavailability of captioning or audio description. Many individuals felt that this not only affected their ability to socialize and fully take part in family outings, but also deprived them of the opportunity to meaningfully engage in the discourse that often surrounds movie attendance. Parents with disabilities also complained that they could not answer their children's questions

about a movie they saw together because the parents did not understand what had happened in the movie.

Of perhaps greater significance to the discussion of the benefits of this rule, however, are issues relating to fairness, equity, and equal access, all of which are extremely difficult to monetize, and the Department has not been able to robustly quantify and place a dollar value on those benefits. Regardless, the Department believes the non-quantifiable benefits justify the costs of requiring captioning and audio description at movie theaters nationwide.

Annualized Costs and Benefits of Proposed Rule (2015 Dollars, 15-year Time Horizon)

	7% Discount Rate			3% Discount Rate		
	Baseline 1 Assumptions (One Screen Per-Theater)	Baseline 2 Assumptions (Litigation-Based)	Baseline 3 Assumptions (NATO Survey Based)	Baseline 1 Assumptions (One Screen Per-Theater)	Baseline 2 Assumptions (Litigation-Based)	Baseline 3 Assumptions (NATO Survey Based)
Costs (million \$)	Option 1 – Four Year Compliance for Analog Screens					
	\$24.8	\$21.1	\$19.5	\$23.1	\$19.7	\$18.3
	Option 2 – Deferred Rulemaking for Analog Screens					
	\$20.4	\$16.7	\$15.2	\$18.9	\$15.6	\$14.2
Benefits	<p>The proposed rule would address the discriminatory effects of communication barriers at movie theaters encountered by individuals who are deaf or hard of hearing or are blind or have low vision. By ensuring that movie theaters screen those movies that are produced and distributed with the necessary auxiliary aids and services—captioning and audio description—and that theaters provide the individual devices needed to deliver these services to patrons with these particular disabilities, this rule would afford such individuals an equal opportunity to attend movies and follow both the audio and visual aspects of movies exhibited at movie theaters. Although the Department is unable to monetize or quantify the benefits of this proposed rule, it would have important benefits. For example, it would provide people with hearing and vision disabilities better access to the movie viewing experience enjoyed by others; it would allow such persons to attend and enjoy movies with their family members and acquaintances; it would allow people with hearing or vision disabilities to participate in conversations about movies with family members and acquaintances; and it would promote other hard-to-quantify benefits recognized in Executive Order 13563 such as equity, human dignity, and fairness.</p>					

Question 17: The Department invites comment on methods and data for monetizing or quantifying the societal benefits of the proposed regulation, including benefits to persons who are deaf or hard of hearing or blind or have low vision, as well as to other members of the movie-going public or other entities. For example, the Department invites comments on methods and data for estimating the number of people with vision or hearing disabilities who would benefit from this rule, and addressing the challenges noted above in developing such an estimate, as well

as comments on methods and data that could be used to estimate the value of the different types of benefits noted above. The Department also invites comments on its qualitative discussion of the benefits of this rule, which include equity, human dignity, and fairness.

B. Regulatory Flexibility Act—Impact on Small Businesses

1. Small Business Threshold Assessment—Methodology and Summary of Results

Consistent with the provisions of the Regulatory Flexibility Act, the Department has also carefully considered the likely impact of the proposed regulation on small businesses in the movie exhibition industry. *See* 5 U.S.C. 605(b); Memorandum for the Heads of Executive Departments and Agencies, Regulatory Flexibility, Small Business, and Job Creation, 76 FR 3827 (Jan. 18, 2011). The Department has determined that this proposed rule will have a significant economic impact on a substantial number of small businesses.

For motion picture theaters, small businesses constitute the vast majority of firms in the industry. The current size standard for a small movie theater business is \$35.5 million dollars in annual revenue. In 2007, the latest year for which detailed breakouts by industry and annual revenue are available, approximately 98 percent of movie theater firms met the standard for small business, and these firms managed approximately 53 percent of movie theater establishments.⁴⁵

As noted earlier, the Department is considering two options for analog screens. Option 1 would delay the compliance date for analog screens for four years after publication of the final rule.

Option 2 would defer rulemaking altogether for analog screens until a later date. The IRFA estimates for Option 1 the average initial capital costs per firm for firms that display digital or analog movies. The average costs for small firms are estimated to be between 0.7 percent to 2.1

⁴⁵ The size standard of \$35.5 million can be found in U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* at 28, available at http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf (last visited July 14, 2014).

percent of their average annual receipts for firms with digital theaters, and between 2.0 percent to 5.7 percent of average annual receipts for firms with analog theaters. The Department has used the IRFA to examine other ways, if possible, to accomplish the Department's goals with fewer burdens on small businesses. The vast majority of theaters with analog screens are small businesses and the Department believes that both of the options for analog screens under consideration in the proposed rule will result in fewer burdens on small movie theater businesses with analog screens.

2. Initial Regulatory Flexibility Analysis

a. Summary of Reasons for Proposed Regulation

Because the Department's rationale for proposing these requirements for movie captioning and audio description have already been discussed in full throughout this preamble (*see, e.g.,* section II.C, *supra*), such reasoning is merely summarized here. There are, in sum, four primary reasons why the Department is proposing regulatory action at this time. First, for persons who are deaf or hard of hearing or blind or have low vision, the unavailability of captioned or audio-described movies inhibits their ability to socialize and fully take part in social and family outings and deprives them of the opportunity to meaningfully participate in an important aspect of American culture. Second, a significant—and increasing—proportion of Americans have hearing or vision limitations that prevent them from fully and effectively understanding movies without auxiliary aids such as captioning and audio description. Third, technological advancements mean not only that an ever-increasing number of movie theaters have been converted to digital cinema systems, but also that such theaters can exhibit movies with closed captions using commercially-available equipment at relatively low cost. And, lastly, despite the availability of these auxiliary aids and the general ADA obligation to provide effective communication to patrons with

disabilities, individuals with disabilities in many parts of the United States continue to lack access to movies with captioning and audio description. Movie theaters' collective compliance efforts to date simply have not resulted in equal access to movies exhibited at theaters nationwide for individuals who are deaf or hard of hearing or blind or have low vision. The Department is thus convinced that regulation is warranted at this time to explicitly require movie theaters to exhibit movies with closed captioning and audio description at all times and for all showings whenever movies are produced, distributed, or otherwise made available with captioning and audio description, unless to do so would result in an undue burden or fundamental alteration. This proposed regulation is necessary in order to achieve the goals and promise of the ADA.

b. Summary of Objectives of, and Legal Basis for, the Proposed Regulation

The proposed rule for captioning and audio description rests on the existing obligation of title III-covered facilities—such as movie theaters—to ensure that persons with disabilities receive “full and equal enjoyment” of their respective goods and services, including, as needed, the provision of auxiliary aids and services for persons who are deaf or hard of hearing or blind or have low vision. The proposed rule states that a movie theater owner or operator is required to exhibit movies with closed captioning and audio description for all screenings so long as the movie has been produced by the movie studio or distributor with captioning or audio description (unless doing so would result in an undue burden or fundamental alteration). The proposed rule imposes no independent obligation on movie theaters to provide captions and audio description if the movie is not available with these features.

The Department expects that implementation of the proposed rule will lead to consistent levels of accessibility in movie theaters across the country, and that patrons who are deaf or hard

of hearing or blind or have low vision will be able to use captioning or audio description equipment to better understand movies being exhibited in movie theaters.

The legal basis for the Department’s proposed regulation—discussed at length in other parts of this preamble (*see* section II.B, *supra*)—rests on both title III of the ADA and its existing implementing regulation. Title III prohibits public accommodations, which, by statutory definition, include movie theaters, from discriminating against any individual on the basis of disability in the full and equal enjoyment of their goods and services. 42 U.S.C. 12182(a). Further, of particular import to the proposed regulation, title III also requires public accommodations to take whatever affirmative steps may be necessary “to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently * * * because of the absence of auxiliary aids and services” absent a showing of fundamental alteration or undue burden by such public accommodation. 42 U.S.C. 12182(b)(2)(A)(iii).

The Department’s recently-revised title III regulation reiterates these statutory requirements—which were first incorporated into the implementing regulation in 1991—and emphasizes that the overarching obligation of a public accommodation is to ensure effective communication with individuals with disabilities through the provision of necessary auxiliary aids and services. 28 CFR 36.303(c). While the type of auxiliary aid or service necessary to ensure effective communication depends on several factors, including the method of communication used by the individual and the communication involved, closed captioning and audio recordings are specifically referenced as aids or services contemplated by the rule. 28 CFR 36.303(b)(1), (2). Here, in the context of movie screenings at movie theaters, captioning is the only auxiliary aid presently available that effectively communicates the dialogue and sounds in a movie to

individuals who are deaf or whose hearing impairments otherwise preclude effective use of assistive listening systems.⁴⁶ Likewise, for individuals who are blind or who have low vision, the only auxiliary aid presently available that effectively communicates the visual components of a movie is audio description.

c. Estimated Number and Type of Small Entities in the Movie Exhibition Industry

The Regulatory Flexibility Act defines a “small entity” as a small business (as defined by the Small Business Administration Size Standards) or a small organization such as a nonprofit that is “independently owned and operated” and is “not dominant in its field.” 5 U.S.C. 601(6); *see id.* 601(3) and (4); 15 U.S.C. 632. For motion picture theaters (North American Industry Classification System Code 512131), small businesses constitute the vast majority of firms in the industry. The current size standard for a small movie theater business is \$35.5 million dollars in annual revenue.⁴⁷ In 2007, the latest year for which detailed breakouts by industry and annual revenue are available, approximately 98 percent of movie theater firms met the standard for small business, and these firms managed approximately 53 percent of movie theater establishments. Data from the 2007 Economic Census, prepared for the Small Business Administration (SBA) and downloaded from its Web site, report that 2,004 movie theater firms operated 4,801

⁴⁶ Proposed § 36.303(g)(2)(ii) states that “[m]ovie theaters may meet their obligation to provide captions to persons with disabilities through use of a different technology, such as open movie captioning, so long as the communication provided is as effective as that provided to movie patrons without disabilities.” This provision will allow theaters the option to choose newer and more cost effective technologies to provide effective communication to movie patrons, if such technologies are developed in the future.

⁴⁷ The size standard of \$35.5 million can be found in U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* at 28, available at http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf (last visited July 14, 2014).

establishments that year; of those 2,004 movie theater firms, approximately 1,965 would meet the current SBA standard for a small business.⁴⁸ These 1,965 firms operated 2,566 establishments.

⁴⁸ Data taken from Excel file “static_us” downloaded from SBA Web site for “Firm Size Data,” available at <http://www.sba.gov/advocacy/849/12162> (last visited July 14, 2014). Calculations were also performed using a dataset from the Census Bureau’s American FactFinder. See <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited July 14, 2014). Both datasets are derived from the 2007 Economic Census, but differ slightly.

Distribution of Movie Theater Firms, by Revenue, 2007

	Number of firms	Number of establishments	Firms as % of TOTAL	Cumulative total	Establishments % of TOTAL	Cumulative total
Total Firms	2,004	4,801	100%	--	100%	--
Firms with sales/receipts/revenue less than \$100,000	333	333	16.6%	16.6%	6.9%	6.9%
Firms with sales/receipts/revenue of \$100,000 to \$499,999	703	712	35.1%	51.7%	14.8%	21.8%
Firms with sales/receipts/revenue of \$500,000 to \$999,999	318	339	15.9%	67.6%	7.1%	28.8%
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	386	472	19.3%	86.8%	9.8%	38.7%
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	109	197	5.4%	92.3%	4.1%	42.8%
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	40	99	2.0%	94.3%	2.1%	44.8%
Firms with sales/receipts/revenue of \$7,500,000-\$9,999,999	24	60	1.2%	95.5%	1.2%	46.1%
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	23	106	1.1%	96.6%	2.2%	48.3%
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	13	105	0.6%	97.3%	2.2%	50.5%
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	6	50	0.3%	97.6%	1.0%	51.5%
Firms with sales/receipts/revenue of \$25,000,000 to \$29,999,999	8	79	0.4%	98.0%	1.6%	53.2%
Firms with sales/receipts/revenue of \$30,000,000 to \$34,999,999	2	14	0.1%	98.1%	0.3%	53.4%
Firms with sales/receipts/revenue of \$35,000,000+*	39	2,235	1.9%	100.0%	46.6%	100.0%

* Firms with sale/receipts/revenue of higher than \$35,500,000 are not considered small businesses under SBA size standards. The SBA database presents data for these firms in six categories, which have been consolidated into one for this table.

Source: number of firms and number of establishments from Small Business Administration, Statistics of U.S. Businesses, Business Dynamics Statistics, Business Employment Dynamics, and Nonemployer Statistics. <http://www.sba.gov/advocacy/849/12162> (last visited July 14, 2014). Downloaded from SBA web site December 2013.

As part of a larger movement within the film producing industry, nearly all (if not all) film production is moving to digital, and the vast majority of, if not nearly all, movie theaters likely will convert to the digital format. Because of the cost of transitioning to digital, large firms are more likely to have already converted to digital, or plan to do so soon. For these same reasons, analog theaters are more likely to be small businesses. At the same time, per screen costs of captioning equipment are significantly higher for analog theaters than for digital theaters.

While the first movie theaters were facilities with a single screen and auditorium, in recent years larger facilities are being built, some with a dozen or more auditoriums and screens each capable of showing movies at the same time. Yet, at this time, many single screen theaters remain open. The Initial RA prepared detailed costs estimates, over time, using four theater size categories based on data presented by the MPAA. To estimate the costs to small businesses, this IRFA examined the percentages of small businesses and the distribution of theaters and screens by theater size type, and made estimations regarding the likely prevalence of small businesses among each size type (see the table below). No Megaplexes are expected to be small businesses.

Theaters by Type and Estimated Prevalence of Small Businesses

Theater Type	Projected Number of Theaters in 2015	Annual Growth Rate	Likelihood of Small Businesses
Megaplex – 16+ screens	718	2.0%	<i>No small businesses</i>
Multiplex – 8-15 screens	1,893	2.0%	Some small businesses
Miniplex – 2-7 screens	1,500	-4.2%	Many small businesses
Single Screen – 1 screen	996	-4.2%	Nearly all small businesses
TOTAL	5,107	---	

Source: Estimated using data for 2008-2012 as in MPAA, *Theatrical Market Statistics* (2012), available at <http://www.mpa.org/wp-content/uploads/2014/03/2012-Theatrical-Market-Statistics-Report.pdf> (last visited July 14, 2014).

Estimates of Digital and Analog Theaters and Screens in 2015

	Number of Digital Theaters	Number of Digital Screens	Number of Analog Theaters	Number of Analog Screens
Megaplex – 16+ screens	718	12,924	0	0
Multiplex – 8-15 screens	1,893	20,823	0	0
Miniplex – 2-7 screens	452	1,807	1,048	4,192
Single Screen – 1 screen	300	300	696	696
<i>TOTAL</i>	<i>3,363</i>	<i>35,854</i>	<i>1,744</i>	<i>4,888</i>

The proposed rule does not apply different requirements to firms by size. It does, however, seek public comment on two options for theaters with analog screens. Option 1 would delay the compliance date for analog screens for four years after publication of the final rule. Option 2 would defer rulemaking altogether for analog screens until a later date. As stated previously, the vast majority of theaters with analog screens are small businesses, and the Department believes that both of the options for analog screens under consideration in the proposed rule will result in fewer burdens on small movie theater businesses with analog screens. While this small business assessment necessarily draws on the Initial RA’s “main” cost model, it also incorporates data specific to small businesses. As required by the Regulatory Flexibility Act,⁴⁹ the cost model underlying the Initial RA’s small business assessment uses SBA-defined small business size standards.⁵⁰ A dataset downloaded from SBA’s Web site presents data for 18 different revenue size categories (12 of those categories for firms with estimated annual receipts of less than the \$35.5 million size standard for a small firm in this industry). These 18 revenue size categories were consolidated into four categories, with the following three meeting the SBA size standard

⁴⁹ See 5 U.S.C. 601 *et seq.*

⁵⁰ The Small Business Size Regulations can be found at 13 CFR part 121.

for a small business: Firms with sales/receipts/revenue of (a) \$499,999 and under; (b) \$500,000-\$4,999,999; and (c) \$5,000,000-\$34,999,999. One of the 18 revenue categories in the SBA dataset (firms with sales/receipts/revenue of \$30,000,000-\$34,999,999) had only two firms included. To prevent the release of proprietary financial information, the SBA dataset only includes the number of firms and their establishments in this category; it does not include any information on sales, receipts or revenues. Therefore, while the estimate of the total number of small businesses that could be impacted by the proposed rule includes these two firms, the calculations for costs of compliance by revenue category do not.

Question 18a: Numbers of Small Businesses

The Department is interested in receiving comments and data on all of the assumptions regarding the numbers of small entities impacted by this regulation, particularly on the numbers of small entities that have digital or analog screens (or both), the number of screens in each theater, the type of movies shown at these theatres (first-run commercial films, independent films, etc.), and the type of captioning equipment and devices these theatres already have. The Department is particularly interested in data regarding small analog theatres, such as the availability of analog film prints, the availability of movies with captions and audio description (in both analog and digital formats), the rate at which small theatres are converting to digital cinema, and the economic viability of both small analog and small digital theatres. The Department would also be interested in data on the number of analog and digital theaters by theater type and annual receipts. Finally, the Department is interested in whether and to what extent small analog and small digital theaters are participating in certain cost-sharing programs to help convert theaters to digital technology, such as a virtual print fee (VPF) program. If they are not participating in such cost-sharing programs, why not? (See Question 1 for additional

questions about analog theatres).

Question 18b: Numbers of Small Nonprofit Entities

The Department seeks comment and data on small nonprofits that operate theatres that would be covered by this proposed rule, particularly on the number of small entities in this category, and the potential costs and economic impacts of the proposed rule. Should the Department adopt a different compliance schedule for these theaters?

d. Estimated Cost of Compliance for Small Entities⁵¹

The SBA/U.S. Economic Census data was incorporated into the Initial RA's estimation for impacts on small businesses. First, receipt data was used to develop assumptions regarding the distribution of "small businesses" among the four theater size types. The assignment of theater size type is critical to the estimation because it determines the number of screens and, therefore, total costs per establishment.

Using the Initial RA cost model estimation of the number of theaters by size type in 2015, the IRFA distributed the number of establishments of small business movie theater firms beginning with all Single Screen establishments and then applied the remaining portion to Miniplex and Multiplex establishments.

⁵¹ This estimate of costs for small businesses assumes that the Department would proceed under Option 1 (four-year compliance date for analog screens). If the Department decides to adopt Option 2 for the final rule and defer application of the requirements of the rule for analog screens, the costs for small businesses will be significantly less because the rule will only apply to small business digital theaters.

2015 Distribution of Theaters (Model Projection)

Theater Size Type	Number of Theaters	Percentage
Megaplex	718	14.1%
Multiplex	1,893	37.1%
Miniplex	1,500	29.4%
Single Screen	996	19.5%
TOTAL	5,107	100%

For this distribution, Single Screen theaters made up 89.6 percent of establishments in the smallest revenue category. The remaining establishments in this category were assumed to be Miniplexes. All of the establishments with receipts between \$500,000 and \$4,999,999 were assumed to be Miniplex theaters. After allocating those theaters, the remaining Miniplex theaters estimated for 2015 were distributed to the largest revenue category. Because there were more theaters in the largest revenue category than the remaining estimated Miniplex theaters, the other theaters in this revenue category were assumed to be all Multiplexes (approximately 41 percent). These distributions are summarized below. These distributions were then used to estimate the average cost per firm in each of the three consolidated small business revenue categories.

Distribution of Theater Size Type for Consolidated Revenue Groups

Consolidated Revenue Group ⁵²	Theater Size Type
\$499,999 and under	89.6% Single Screen, 10.4% Miniplexes
\$500,000-\$4,999,999	100% Miniplexes
\$5,000,000 to \$35,500,000	58.8% Miniplexes; 41.2% Multiplexes

⁵² The distribution is slightly different using the dataset from American FactFinder: For firms with revenue \$499,999 and under, 100 percent were assumed to be Single Screen; for those with revenue \$500,000-\$4,999,999, 7 percent were Single Screens and 93 percent Miniplexes; for those with revenue \$25,000,000 to \$35,500,000, 79 percent were Miniplexes and 21 percent Multiplexes.

Theater Equipment Requirements Based on Scoping and Theater Size

Equipment	Megaplex <i>Avg: 18 Screens</i>	Multiplex <i>Avg: 11 Screens</i>	Miniplex <i>Avg: 4 Screens</i>	Single Screen
Captioning Hardware and Devices				
Captioning Hardware Needed	18	11	4	1
Captioning Devices Needed	34	28	12	4
Descriptive Listening Hardware and Devices				
Audio Hardware Needed	18	11	4	1
Audio Devices Needed	18	11	4	2

Using the average costs per theater developed in the Initial RA, we were able to calculate the average costs per theater and per firm for the three consolidated revenue groups (\$499,999 and under; \$500,000-\$4,999,999; and \$5,000,000-\$35,500,000). Costs were first calculated on a per-establishment basis, and then using the average number of establishments per firm for each of the three consolidated revenue groups, translated into an average per firm cost. This cost was then compared to the average receipts per firm for that consolidated revenue group.

The resulting ratio of average costs to average receipts ranges from a low of 0.7 percent (for digital firms with revenues of \$5,000,000 to \$35,500,000) to a high of 5.7 percent (for analog firms with revenues of \$499,999 or less). The impact on firms with digital projection is comparatively smaller than the impact on firms maintaining analog projection. The ratio of average costs/receipts is estimated to range from 0.7 percent to 2.1 percent for all movie theater companies using digital systems. In contrast, the same ratio ranges from 2.0 percent to 5.7 percent for all firms using analog projection.

Estimation of Costs for Small Movie Theaters, By Firm Size, Based on 2015 Size/Revenue Distribution

Cost	Firms \$499,999 and under	Firms \$500,000 to \$4,999,999	Firms \$5,000,000 to \$35,500,000**
Digital			
Average receipts per firm*	\$188,384 to \$201,973	\$1,471,549 to \$1,484,995	\$9,705,377 to \$12,437,259
Average cost per theater*	\$3,198 to \$3,966	\$10,063 to \$10,586	\$13,984 to \$17,281
Average cost per firm*	\$3,233 to \$3,992	\$12, 539 to \$14,454	\$81, 176 to \$103,309
Ratio of average cost/receipts*	1.6% to 2.1%	0.8% to 1.0%	0.7% to 1.1%
Analog			
Average receipts per firm*	\$188,384 to \$201,973	\$1,471,549 to \$1,484,995	\$9,705,377 to \$12,437,259
Average cost per theater*	\$8,172 to \$10,638	\$30,204 to \$31,884	\$43,449 to \$54,673
Average cost per firm*	\$8,263 to \$10,706	\$37,638 to \$43,534	\$252,224 to \$326,844
Ratio of average cost/receipts*	4.1% to 5.7%	2.5% to 3.0%	2.0% to 3.4%

* The ranges represent the figures calculated using the two datasets created from data from the 2007 Economic Census, which breaks out data by revenue category (downloaded from SBA's Web site (<http://www.sba.gov>) and the Census Bureau's American FactFinder Web site (<http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>), respectively), but which differ slightly. Note that the composition of theater size types also varies per revenue group depending on the dataset used, and therefore the average cost per theater varies as well.

** Note that the calculations for this category using the dataset downloaded from the SBA Web site do not include any data for the two firms in the revenue category for firms with sales/receipts/revenue of \$30,000,000-\$34,999,999 because no data on annual receipts for those two firms was included. The dataset downloaded from American FactFinder had different revenue categories from those downloaded from SBA's Web site. To estimate those firms meeting the SBA size standards using the dataset downloaded from the American FactFinder Web site, all the firms with revenues less than \$25 million, and half of those with revenues from \$25,000,000 to \$49,999,999 were counted as a way of estimating the number of entities that fall under \$35.5 million within that revenue category.

Average capital costs per theater type were estimated by multiplying the number of screens by the required analog or digital equipment and the scoped number of devices. These average costs are presented below.

Estimated Average Receipts and Costs per Firm, Digital and Analog

	Digital				Analog			
Size of firms (\$)	Average receipts per firm	Average cost per theater	Average cost per firm	Ratio of average cost/receipts	Average receipts per firm	Average cost per theater	Average cost per firm	Ratio of average cost/receipts
Less than \$100,000	\$52,264	\$3,198	\$3,198	6.1%	\$52,264	\$8,172	\$8,172	15.6%
\$100,000-499,000	\$252,862	\$4,326	\$4,381	1.7%	\$252,862	\$11,791	\$11,942	4.7%
\$500,000-999,000	\$711,456	\$10,586	\$11,285	1.6%	\$711,456	\$31,884	\$33,990	4.8%
\$1,000,000-2,499,000	\$1,581,824	\$10,586	\$12,945	0.8%	\$1,581,824	\$31,884	\$38,988	2.5%
\$2,500,000-4,999,000	\$3,298,550	\$10,586	\$19,132	0.6%	\$3,298,550	\$31,884	\$57,625	1.7%
\$5,000,000-7,499,000	\$5,888,575	\$10,586	\$26,200	0.4%	\$5,888,575	\$31,884	\$78,913	1.3%
\$7,500,000-9,999,000	\$7,954,042	\$10,586	\$26,465	0.3%	\$7,954,042	\$31,884	\$79,710	1.0%
\$10,000,000-14,999,000	\$9,927,478	\$10,586	\$48,788	0.5%	\$9,927,478	\$31,884	\$146,944	1.5%
\$15,000,000-19,999,000	\$14,045,000	\$22,436	\$181,213	1.3%	\$14,045,000	\$72,219	\$583,306	4.2%
\$20,000,000-24,999,000	\$16,288,167	\$26,839	\$223,658	1.4%	\$16,288,167	\$87,206	\$726,717	4.5%
\$25,000,000-29,999,000	\$21,415,875	\$26,839	\$265,035	1.2%	\$21,415,875	\$87,206	\$861,159	4.0%

Based on data from Small Business Administration, Statistics of U.S. Businesses, Business Dynamics Statistics, Business Employment Dynamics, and Nonemployer Statistics, available at <http://www.sba.gov/advocacy/849/12162> (data downloaded Dec. 2013). See Table 38 in the Initial Regulatory Assessment and Initial Regulatory Flexibility Analysis (available at <http://www.ada.gov>) for more information on how the figures in this table were calculated.

Digital Captioning Equipment Unit Costs

Technology	Digital Captioning Hardware Cost (one needed per screen)	Digital Captioning Individual Device Costs (multiple per screen/theater may be needed)	Digital Audio Description Hardware Cost (one needed per screen)	Digital Audio Description Individual Device Costs (multiple per screen/theater may be needed)
Doremi's CaptiView	\$690	\$430	\$625	\$125
USL	\$1,057	\$479	\$0	\$69

Analog Captioning Equipment Unit Costs

Technology	Analog Captioning Hardware Cost (one per screen needed)	Analog Captioning Device Costs (multiple per screen/theater may be needed)	Analog Audio Description Hardware Cost (one per screen needed)	Analog Audio Description Device Costs (multiple per screen/theater may be needed)
Rear Window ⁵³	\$7,113	\$95	\$467	\$106

⁵³ The hardware required for Rear Window technology includes a LED display necessary to show captions in each analog projection auditorium, a Datasat/DTS XD20 interface, and individual Reflectors that are used by patrons. The cost for the LED display ranges from \$2,850 to \$3,975, depending on whether it is a 2- or 3-line display (a 2-line display is recommended); the LED display cost used in Regulatory Analysis is an average of the cost of the two sizes of display. The Datasat/DTS XD20 interface, which is an interface connecting the Rear Window LED display to the theater system, costs about \$4,200 per auditorium. The only device for individual use is the Rear Window Reflector, which fits into cup holders and costs \$95 each. (Note: all these prices are taken from the "Rear Window® Captioning (RWC) Components Cost Overview" released by Median Access Group at WGBH August 2010, and adjusted for the fact that licensing fees are no longer required.) For audio description, the Williams Sound Audio System is compatible with analog captioning systems and was used to estimate video description equipment costs for analog systems. The Williams Sound Audio System requires an audio transmitter for each auditorium, which costs \$467. Patrons may use a receiver and a headset, which cost \$88 and \$18, respectively.

Average per Establishment Costs of Purchasing Digital Closed Captioning and Audio Description Equipment

Cost Per Digital Theater	Doremi	USL	Average Digital Cost
Megaplex*	\$40,540	\$36,554	\$38,547
Multiplex	\$27,880	\$25,798	\$26,839
Miniplex	\$10,920	\$10,252	\$10,586
Single Screen	\$3,285	\$3,111	\$3,198

* Note that the Initial RA assumes that no small business firm has Megaplexes; this data is presented for informational purposes only, to help illustrate the differences in average costs per digital theaters by type.

Average per Establishment Costs of Purchasing Analog Closed Captioning and Audio Description Equipment

Cost Per Analog Theater⁵⁴	Rear Window
Megaplex	**
Multiplex	**
Miniplex	\$31,884
Single Screen	\$8,172

** Note that the Initial RA assumes that all Megaplexes and Multiplexes have transitioned to digital projection systems by the time this rule goes into effect.

Question 19: Small Business Compliance Costs

The Department seeks comment and data on the small business compliance cost estimates, including the costs associated with procuring and maintaining digital and analog equipment, the availability of this equipment, estimates of the average cost of this proposed rule by establishment and firm, and the ratio of average costs of this proposed rule to firm receipts. The Department is interested in comment on whether small theaters will incur higher prices in the purchase and

⁵⁴ Note that in the main Initial RA, all of the Megaplexes and Multiplexes are assumed to have converted to digital projection. This assumption was made because NATO had estimated at a Congressional hearing in May 2013 that 88 percent of screens in the nation now have digital projection, making it very unlikely that any large theater complex remains analog. If any Megaplexes and/or Multiplexes stayed with analog projection, their average costs for purchasing analog closed captioning and audio description equipment would be \$141,578 and \$87,206, respectively.

installation of this equipment due to the lower volume needed. The Department also seeks public comment on its proposed scoping for individual captioning devices. Should the Department consider approaching scoping differently for small theatres? How so and why? (Please see Question 10 for additional questions about scoping for captioning devices). How many devices capable of transmitting audio description to individuals should each movie theater have on hand for use by patrons who are blind or have low vision? (Please see Question 12 for additional questions about scoping for audio description). Do small theaters face any additional costs not already included in these cost estimates? The Department seeks comment and data on what, if any, particular requirement of this rule would cause a small business to claim that it is an undue burden to comply with the requirements of this proposed rule.

e. Projected Reporting, Record-Keeping Requirements and Other Compliance Requirements of the Rule

As noted below in section VI.F, discussing the Paperwork Reduction Act, the proposed regulation imposes no reporting or record-keeping requirements on any movie theaters regardless of size. The Department acknowledges that there may be other compliance-related administrative costs incurred by all movie theaters—including small entities—as a result of the proposed regulation, including such tasks as having theater staff keep track of individual captioning devices or audio description headsets. However, such compliance costs are expected to be neither disproportionately borne by small entities nor significant. The proposed scoping requirements for individual captioning devices are directly proportional to total seat count or screen. The proposed scoping for individual audio-description devices is minimal and only applies to those theaters that do not currently have assistive listening receivers with at least two channels. Thus, smaller movie theaters (such as Miniplexes and Single Screen Theaters) necessarily would have relatively few

pieces of required captioning and audio description equipment to inventory and maintain. Moreover, any costs related to such administrative tasks are expected to be minimal. The Department has also asked whether it should take a different approach to scoping for individual captioning devices for small theaters.

The rule will require that at least one person at the theater be able to provide patrons with captioning and audio description and direct patrons on the equipment's use. This requirement can most easily be met by expanding the training for those persons who will already be required to be on-site to manage or oversee overall operations and the start of the exhibition of the movies. In addition, theaters already provide staff to distribute assistive listening devices when requested by patrons and to direct patrons on how to use those devices. It is reasonable to assume that the same staff member would provide assistance with captioning and audio description devices as well. A separate staff with ADA expertise is not required. The costs of this part of the rule will include any additional training time and any time spent providing and collecting devices and demonstrating their use, if needed.

The Initial RA uses a value equivalent to 3 percent of all the captioning and audio description equipment owned by the theater to capture the afore-discussed minimal operations and maintenance cost and incremental increase to staff time; costs of adding information that captioning or audio description is available when preparing communications regarding movie offerings, and other potential increases in administrative costs. This 3 percent is a factor commonly used in construction and equipment maintenance. *See, e.g.,* Final Regulatory Impact Analysis of the Proposed Revised Regulations Implementing Titles II and III of the ADA, Including Revised ADA Standards for Accessible Design: Supplemental Results (Sept. 15, 2010), available at http://www.ada.gov/regs2010/RIA_2010regs/ria_supp.htm (last visited July 14,

2014).⁵⁵ The Department expects that annual operations, maintenance, and training costs for analog theaters are estimated to average from a low of \$245 for Single Screens to a high of \$957 for Miniplexes; for digital theaters' operations, maintenance and training costs are estimated to average from a low of \$96 for Single Screens to a high of \$1,156 for Megaplexes.⁵⁶

Question 20: Other Costs for Small Businesses

The Department invites comment on the estimation of operation and maintenance costs for this proposed rule, which include administrative costs to keep track of equipment, staff training and availability (see Question 15 for additional questions related to staff training), maintenance and replacement of captioning and audio description hardware and individual devices, and the notice requirement (see Questions 14 and 16 for additional questions about the notice requirement). The Department is particularly interested in receiving comments about the costs and frequency of replacing captioning and audio description equipment. Are there other compliance costs, such as regulatory familiarization, that should be included in this small business analysis?

f. Duplicative or Overlapping Federal Rules

The Department is not aware of any existing federal regulations that impose duplicative, overlapping, or conflicting requirements relative to the requirements in the proposed movie captioning and audio description regulation.

⁵⁵ See *id.* app. I: Operations and Maintenance, for more information on standard operations and maintenance costs, and the sources from which those were derived.

⁵⁶ See the Initial RA, Section 7 for the Sensitivity Analysis with two alternative rates—5 percent and 8 percent—for calculating operations and maintenance costs.

g. Discussion of Significant Regulatory Alternatives That Minimize Impact on Small Entities

In crafting this proposed regulation for movie captioning and audio description, the Department has taken care to propose requirements that temper effectiveness with cost considerations. That is, while the Department believes this regulatory action is required to support and enforce the ADA’s effective communication mandate, the proposed requirements also are intended to regulate in a manner that is cost-efficient, easily understood by the movie exhibition industry, and—to the greatest extent possible—minimizes the economic impact on small entities.

As detailed earlier in this preamble (*see* section IV, Section-by-Section Analysis, “Movie Captioning—Coverage, *supra*), the Department is proposing that all movie theaters covered by the rule, regardless of size, location, or type of movies exhibited, must exhibit captioned or audio-described movies (when available) for all screenings absent a showing of undue burden. Only such an across-the-board requirement fulfills the effective communication objective by permitting individuals who are deaf or hard of hearing or blind or have low vision disabilities to fully and equally participate in one of the most quintessential forms of American entertainment—going out to the movies—in the same manner as the rest of the movie going public.

Yet, while the proposed regulation imposes captioning and audio description requirements on all movie theaters irrespective of size, there are nonetheless several provisions that serve to ameliorate their relative economic impact on small entities. For example, the Department’s regulatory proposal:

- Proposes two alternatives for theaters with analog screens: a four-year delayed compliance date (Option 1), or deferral of the requirements of this proposed rule for analog screens (Option 2);

- Establishes performance (rather than design) standards that enable small entities (as well as other movie theaters) to meet their captioning requirements in a flexible and cost-effective manner (§ 36.303(g)(2)(i));
- Specifies scoping requirements for individual captioning devices that are proportional to a theater’s total seat count (*i.e.*, fewer seats means fewer devices are required), thereby ensuring that small theaters have reduced device costs (§ 36.303(g)(2)(iii)(A), (g)(3)(ii));
- Specifies a minimal number of individual audio-description listening devices that must be provided by a theater and permits “overlap” of scoping for audio-description listening devices and assistive listening headsets so long as such headsets are capable of receiving both types of audio signals (§ 36.303(g)(3)(ii)).

Moreover, while not expressly referenced in the text of proposed § 36.303(g), the Department has reiterated—at several points in this preamble—that those movie theaters that find that it is a significant difficulty or expense to comply with the requirements of this regulation will be able to assert the “undue burden defense” (*see* section II.B.2 *supra*, for an explanation of the factors that should be considered in asserting the defense). Throughout the last two decades, even without this regulation, movie theaters have been able to assert this defense when facing litigation alleging failure to provide effective communication to patrons with disabilities. Thus, while a large movie theater trade association suggested that many—if not most—small theaters would be forced out of business unless exempted entirely from any

captioning requirements, the Department believes that such dire predictions are misplaced.⁵⁷ The “undue burden” defense serves as a limit should there be regulatory compliance costs that under particular circumstances would impose significant difficulty or expense. Where the costs of screening closed-captioned or audio-described movies in compliance with the proposed regulation are sufficiently burdensome as to place a small theater at financial risk, then such costs would—by definition—pose an “undue burden.” Such a movie theater would then be entitled to provide alternate compliance measures for auxiliary aids or services (if any) that were affordable in light of its particular circumstances.

Taken together, the foregoing considerations demonstrate the Department’s sensitivity to the potential economic (cost) impact of the proposed regulation on small theaters (such as Miniplexes and Single Screen Theaters) and—to the extent consistent with the ADA—mitigate potential compliance costs.

In addition, the Department considered multiple alternatives for this rulemaking with a focus on choosing the alternative that best balances the requirements of the ADA with the potential costs to small business movie theaters. Among those alternatives weighed most heavily for the proposed rule are the two discussed below.

Requiring only 50 percent of screens to have closed captioning and audio description. The Department considered a proposal limiting the requirement for closed captioning and audio description to only 50 percent of movie screens. This alternative was discussed in the July 26,

⁵⁷ While the number of public comments received in response to the 2010 ANPRM was extraordinary, there were relatively few comments that specifically addressed the impact of captioning requirements on small theaters. No comments were received from representatives of independent movie theaters or from individual small (indoor) movie theater operators other than representatives of drive-in theaters (which are not covered by this rule). The referenced comment from the movie theater trade association is the only comment by representatives of the theatrical or movie exhibition industry to address the potential impact of the captioning regulation on small theaters affected by this rule.

2010, ANPRM. The ADA requires places of public accommodation “to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.” 42 U.S.C. 12182(b)(2)(A)(iii). After considering public comment and additional research, the Department has determined that it is not possible for movie theaters to meet their ADA obligation to provide equally effective communication to patrons with hearing and vision disabilities unless they have the capacity to show the movies that are available with captions and audio description at all showings when those same movies are available to patrons without disabilities; to only require access to 50 percent of movies being shown would be inappropriate. Unless a movie theater showed every movie on two screens in comparable auditoriums at all times—one screen showing the captioned and audio-described version and the other showing the same movie without captions and audio description—the Department is concerned that a 50 percent requirement would regularly lead to the circumstance where a movie theater would have a captioned or audio described movie, but would have no screen available on which to show it because all the appropriately equipped auditoriums were otherwise in use.

The Department considered whether it would be possible for movie theaters to meet their effective communication obligations by switching movies into auditoriums equipped to show movies with closed captions and audio description when a patron with a hearing or vision disability needed those accessibility features. But, the Department’s research indicated that the business agreements regarding movie exhibitions limit this type of flexibility. Movie theaters regularly negotiate with film distributors regarding which auditoriums in a theater with more than

one screen will show which films. Generally, if a film is expected to be very popular, it will open in the largest auditorium or in several auditoriums within the same complex. As the popularity decreases, the film will be moved from larger auditoriums to smaller auditoriums and from multiple auditoriums to a single auditorium. The timing of such moves will vary from theater to theater and from film to film.

Those theaters that do have the flexibility to switch auditoriums upon request to provide closed captioning or audio description would have other added costs associated with changing the auditoriums for showings. Costs could include the additional employee time and resources needed to physically switch the movie from one auditorium to another, as well as potential lost ticket sales if a more popular movie is displaced into a much smaller theater that sells out faster. Additionally, switching auditoriums to allow use of captioning or audio description equipment may result in auditorium changes for other patrons after they had purchased tickets and are possibly already seated. This would result in an inconvenience to many patrons, including the possibility that the switch would result in a different viewing experience than expected when purchasing a ticket due to differing auditorium sizes and comfort levels.

The Department also believes that this alternative would carry a much higher litigation risk. Patrons with disabilities would not have any way of assessing whether the failure to show a particular movie with closed captions and audio description was because the theater was failing to comply with its obligations under the regulation to provide these auxiliary aids and services or because that particular movie was not available with closed captions or audio description. Whether a theater had the capacity to move a film to accommodate a patron with a disability and should have done so upon request, or whether the theater did everything to meet its obligations

under the regulation, would become murky and create confusion that could result in an increased risk of litigation.

Finally, this alternative favors larger movie theaters and disadvantages single screen theaters, which are more likely to be small businesses. Under a 50 percent requirement, at least one auditorium at every theater must have closed captioning and audio description capabilities. Thus, single screen theaters would see no reduction in costs under this alternative.

As such, the Department has rejected this alternative due to concerns that requiring only 50 percent of screens to have closed captioning and audio description capabilities would not comply with the ADA itself, that this approach would require substantial changes to the movie theater business model, that the initial perceptions that this approach would have substantially lower total costs are actually misleading, and that this approach would not address in any meaningful way the concerns for small business single screen theaters.

Compliance by analog theaters required in two years. The Department considered providing theaters with analog screens two years after the rule's publication date to become compliant, as opposed to the six-month compliance date provided for digital screens. This delay was considered for analog movie screens because such a large number of theaters are in the midst of transitioning to digital cinema, that additional time might be necessary. In addition, the delayed compliance date would have allowed small theaters that remain analog more time to obtain the necessary resources to purchase the equipment to provide closed captioning and audio description. The 15-year, discounted costs for this alternative range from \$189.4 million to \$237.5 million under a 7 percent discount rate, which are higher than the total costs for the proposed rule.

Upon review of the higher cost burden for firms still using analog projection, and with consultation from the Small Business Administration's Office of Advocacy, and as previously discussed, the Department is considering two alternative options for theaters with analog screens: (1) a four-year compliance date for theaters with analog screens (Option 1); or (2) deferring application of the requirements to analog screens until a later date (Option 2). In making the decision, the Department also took into consideration the fact that those movie theaters that have not yet made the transition to digital systems are more likely to be small businesses than those movie theaters that are already exhibiting in digital format. The Department also considered publicly available information that movie studios are in the process of phasing out analog film, and it is anticipated that by 2015, studios will not be producing analog prints of first run films. On the basis of this information, it appears likely that movie theaters that rely on first-run films for revenue will either convert to digital or go out of business before the four-year compliance date (sometime in 2018 or 2019), and thus there will actually be many fewer analog theaters that will need to comply with the rule if the Department proceeds under Option 1. If the Department proceeds under Option 2, there will be fewer small business theaters affected by the rule, because it will only apply to small business digital theaters.

Question 21a: Significant Alternatives for Small Analog Theaters under the RFA

Is the four-year compliance date in Option 1 reasonable for those screens that will remain analog? If not, why not? Should the Department adopt Option 2 and defer requiring theaters with analog screens to comply with the specific requirements of this rule? (See Questions 6 and 8).

Question 21b: Significant Alternatives for Small Digital Theaters under the RFA

Is the proposed six-month compliance date for digital screens a reasonable timeframe to comply with the rule? Is six months enough time to order, install, and gain familiarity with the necessary equipment; train staff so that they can meaningfully assist patrons; and meet the notice requirement of the proposed rule? If the proposed six-month date is not reasonable, what should the compliance date be and why? (See Question 7).

Question 21c: Other Significant Alternatives for Small Theaters under the RFA

The Department invites comment on ways to tailor this regulation to reduce unnecessary regulatory burdens on small businesses.⁵⁸ For example: Should the Department have a different compliance schedule for digital or analog theaters that have annual receipts below a certain threshold? If so, what should the financial threshold be? (See Question 6). The Department is also interested in receiving comment and data on the use of the undue burden defense by small businesses.

C. Executive Order 13132: Federalism

Executive Order 13132, 64 FR 43255 (Aug. 4, 1999), 3 CFR, 2000 comp. at 206, requires executive branch agencies to consider whether a rule will have federalism implications. That is, the rulemaking agency must determine whether the rule is likely to have substantial direct effects on State and local governments, a substantial direct effect on the relationship between the Federal government and the States and localities, or a substantial direct effect on the distribution of power and responsibilities among the different levels of government. If an agency believes that a rule is likely to have federalism implications, it must consult with State and local elected officials about how to minimize or eliminate the effects. This proposed rule applies to public

⁵⁸ See Memorandum for the Heads of Executive Departments and Agencies, Regulatory Flexibility, Small Business, and Job Creation, 76 FR 3827 (Jan. 18, 2011).

accommodations that exhibit movies for a fee that are covered by title III of the ADA. To the Department's knowledge there are no State or local codes that specifically address captioning and audio description. As a result, the Department has concluded that this proposed rule does not have federalism implications.

D. Plain Language Instructions

The Department makes every effort to promote clarity and transparency in its rulemaking. In any regulation, there is a tension between drafting language that is simple and straightforward and drafting language that gives full effect to issues of legal interpretation. The Department operates a toll-free ADA Information Line (800) 514-0301 (voice); (800) 514-0383 (TTY) that the public is welcome to call to obtain assistance in understanding anything in this proposed rule. If any commenter has suggestions for how the regulation could be written more clearly, please submit those suggestions by any one of the following methods, making sure to identify this rulemaking by RIN 1190-AA63:

- Federal eRulemaking website: <http://www.regulations.gov>. Follow the Web site's instructions for submitting comments. The Regulations.gov Docket ID is DOJ-CRT-126.
- Regular U.S. mail: Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 2885, Fairfax, VA 22031-0885.
- Overnight, courier, or hand delivery: Disability Rights Section, Civil Rights Division, U.S. Department of Justice, 1425 New York Avenue, N.W., Suite 4039, Washington, D.C. 20005.

E. Paperwork Reduction Act

Under the Paperwork Reduction Act (PRA), agencies are prohibited from conducting or sponsoring a "collection of information" as defined by the PRA unless in advance the agency has

obtained an OMB control number. 44 U.S.C. 3507 *et seq.* This proposed rule does not propose any new or revisions to existing collections of information covered by the PRA.

F. Unfunded Mandates Reform Act

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final Federal regulation that “establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.” Accordingly, this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

List of Subjects for 28 CFR Part 36

Administrative practice and procedure, Buildings and facilities, Business and industry, Civil rights, Individuals with disabilities, Penalties, Reporting and recordkeeping requirements.

By the authority vested in me as Attorney General by law, including 28 U.S.C. 509 and 510, 5 U.S.C. 301, and section 306 of the Americans with Disabilities Act of 1990, Public Law 101-336 (42 U.S.C. 12186), and for the reasons set forth in the preamble, chapter I of title 28 of the Code of Federal Regulations is proposed to be amended as follows:

**PART 36—NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC
ACCOMMODATIONS AND IN COMMERCIAL FACILITIES**

Subpart A—General

1. The authority citation for 28 CFR part 36 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12186(b).

2. In § 36.303,
 - a. Redesignate paragraph (g) as paragraph (h); and
 - b. Add paragraph (g) to read as follows:

§ 36.303 Auxiliary aids and services.

* * * * *

(g) *Movie Captioning and Audio Description*.

(1) *Definitions*. For the purposes of this paragraph—

(i) *Audio description* means provision of a spoken narration of key visual elements of a visually delivered medium, including, but not limited to, actions, settings, facial expressions, costumes, and scene changes.

(ii) *Closed movie captioning* means the written text of the movie dialogue and other sounds or sound making (e.g. sound effects, music, and the character who is speaking). Closed movie captioning is available only to individuals who request it. Generally, it requires the use of an individual captioning device to deliver the captions to the patron.

(iii) *Individual audio description listening device* means the individual device that patrons may use at their seats to hear audio description.

(iv) *Individual captioning device* means the individual device that patrons may use at their seats to view the closed captions.

(v) *Movie theater* means a facility other than a drive-in theater that is used primarily for the purpose of showing movies to the public for a fee.

(vi) *Open movie captioning* means the provision of the written text of the movie dialogue and other sounds or sound making in an on-screen text format that is seen by everyone in the movie theater.

(2) *Movie captioning*. (i) A public accommodation that owns, leases, leases to, or operates a movie theater shall ensure that its auditoriums have the capability to exhibit movies with closed movie captions. In all cases where the movies it intends to exhibit are produced, distributed, or

otherwise made available with closed movie captions, the public accommodation shall ensure that it acquires the captioned version of that movie. Movie theaters must then exhibit such movies with closed movie captions available at all scheduled screenings of those movies.

(ii) *Other technologies.* Movie theaters may meet their obligation to provide captions to persons with disabilities through use of a different technology, such as open movie captioning, so long as the communication provided is as effective as that provided to movie patrons without disabilities. Open movie captioning at some or all showings of movies is never required as a means of compliance with this section, even if it is an undue burden for a theater to exhibit movies with closed movie captioning in an auditorium.

(iii) *Provision of individual captioning devices.* (A) Subject to the compliance dates in paragraph (g)(4) of this section, a public accommodation that owns, leases, leases to, or operates a movie theater shall provide individual captioning devices in accordance with the following Table. This requirement does not apply to movie theaters that elect to exhibit all movies at all times at that facility with open movie captioning.

Capacity of Seating in Movie Theater	Minimum Required Number of Individual Captioning Devices
100 or less	2
101 to 200	2 plus 1 per 50 seats over 100 seats or a fraction thereof
201 to 500	4 plus 1 per 50 seats over 200 seats or a fraction thereof
501 to 1000	10 plus 1 per 75 seats over 500 seats or a fraction thereof
1001 to 2000	18 plus 1 per 100 seats over 1000 seats or a fraction thereof
2001 and over	28 plus 1 per 200 seats over 2000 seats or a fraction thereof

(B) In order to provide effective communication, individual captioning devices must:

(1) Be adjustable so that the captions can be viewed as if they are on or near the movie screen;

(2) Be available to patrons in a timely manner;

(3) Provide clear, sharp images in order to ensure readability; and

(4) Be properly maintained and be easily usable by the patron.

(3) *Audio description.* (i) A public accommodation that owns, leases, leases to, or operates a movie theater shall ensure that its auditoriums have the capability to exhibit movies with audio description. In all cases where the movies it intends to exhibit are produced, distributed, or

otherwise made available with audio description, the public accommodation shall ensure that it acquires the version with audio description. Movie theaters must then exhibit such movies with audio description available at all scheduled screenings.

(ii) *Provision of individual audio-description listening devices.* Subject to the compliance dates in paragraph (g)(4) of this section, a public accommodation that owns, leases, leases to, or operates a movie theater shall provide devices capable of transmitting audio description in accordance with one of the following:

(A) A movie theater shall provide at least one individual audio-description listening device per screen, except that no theater shall provide less than two devices.

(B) A movie theater may comply with this requirement by using receivers it already has available as assistive listening devices in accordance with the requirements in Table 219.3 of the 2010 Standards, if those receivers have a minimum of two channels available for sound transmission to patrons.

(4) *Compliance date.* (i) *Digital movie screens.* If a movie theater (as defined in this paragraph) has auditoriums with digital movie screens, those auditoriums must comply with the requirements in paragraph (g) of this section six months from the publication date of this rule in final form in the **Federal Register**. Once an analog movie screen has converted to digital cinema, it must comply with paragraph (g) within 6 months.

Option 1 for paragraph (g)(4)(ii):

(ii) *Analog movie screens.* If a movie theater (as defined in this paragraph) has auditoriums with analog movie screens, those auditoriums must comply with the requirements in paragraph (g) of this section four years from the publication date of this rule in final form in the **Federal Register**.

Option 2 for paragraph (g)(4)(ii):

(ii) *Analog movie screens.* Application of the requirements of paragraph (g) is deferred for analog movie screens but may be addressed in future rulemaking.

(5) *Notice.* Subject to the compliance dates in paragraph (g)(4) of this section, movie theaters shall ensure that communications and advertisements intended to inform potential patrons of movie showings and times, that are provided by the theater through websites, posters, marquees, newspapers, telephone, and other forms of communications, shall provide information regarding the availability of captioning and audio description for each movie.

(6) Subject to the compliance dates in in paragraph (g)(4) of this section, movie theaters must ensure that there is at least one individual on location at each facility available to assist patrons seeking these services at all times when a captioned or audio-described movie is shown. Such assistance includes the ability to:

- (i) Operate all captioning and audio description equipment;
- (ii) Locate all necessary equipment that is stored and quickly activate the equipment and any other ancillary equipment or systems required for the use of the devices; and
- (iii) Communicate effectively with individuals who are deaf or hard of hearing and blind or have low vision regarding the uses of, and potential problems with, the equipment for such captioning or audio description.

* * *

Dated: July 23, 2014.

Eric H. Holder, Jr.,
Attorney General.

[FR Doc. 2014-17863 Filed 07/31/2014 at 8:45 am; Publication Date: 08/01/2014]